Relocating Transitional Justice from International Law to Muslim-majority Legal Systems: Concepts, Approaches and Ways Forward

PANEPINTO, ALICE,MARTINA

Relocating Transitional Justice from International Law to Muslim-majority Legal Systems

Concepts, Approaches and Ways Forward

A.M. Panepinto

A Thesis submitted for the degree of Doctor of Philosophy

Supervised by

Dr A. O'Donoghue

Prof M. Bohlander

Durham Law School

Durham University

April 2015

Abstract

Relocating Transitional Justice from International Law to Muslim-majority Legal Systems: Concepts, Approaches and Ways Forward

Faced with the constant challenge of adapting to different contexts, the current understanding of transitional justice held by worldwide institutions, NGOs, donors and successor administrations cannot rely on international law alone as a framework of reference for the design and implementation of transitional processes - although the identification, interpretation and uses of local norms is inherently problematic. This thesis considers the tension between different rules applicable to transitional justice and explores their coexistence in the context of legal pluralism, drawing on comparative law perspectives to investigate the distinctive concept of legal truth and the victims' right to it, within the broader transitional aims of accountability, justice and reconciliation after a history of serious abuse. The particular focus on Muslim-majority legal systems provides further appreciation of how transitional justice can be relocated from international law to a given local setting, discussing the difficulties in doing so and the possible solutions with reference to Islamic law and jurisprudence. Rejecting the universalist v relativist deadlock in favour of an interpretation of international law which is permeable to local practices (also channeled through states), this thesis argues that comparative law can help uncover the legal formants of a system and piece together a global set of rules for transitional justice which rely on different normative provenances. Based on a victim-centred approach to transitional justice and the acknowledgement of structural power struggles within societies facing radical political change, this work argues that local and global norms of transitional justice have the potential to cross-fertilise in delivering the key transitional aims. Cultural ownership of rules should not be limited to international actors, national or community leaders: if local unofficial norms resonate with victims and survivors of abuse, provided they do not contrast the transitional objectives, they are likely to contribute to given processes, and in turn influence the global paradigm of transitional justice.

Keywords

transitional justice/ legal pluralism/ comparative legal systems/ international law/ human rights/ Islamic law

Declaration

"No part of this thesis has been submitted elsewhere for any other degree of qualification in this or other university. It is all my own work unless referenced to the contrary in the text"

Statement of Copyright

Acknowledgements

In Durham, my first words of gratitude go to Ustinov College, and in particular (former) Vice-Principal and Senior Tutor Dr Theresa McKinven, for making this materially possible in a mentally stimulating environment. My academic supervisors Dr Aoife O'Donoghue and Prof Michael Bohlander at Durham Law School, and previously Prof James Sweeney now at Lancaster, have been instrumental in providing intellectual and professional guidance throughout the process. Thanks also to Dr Gleider Hernández and Dr Christian Schweiger for supporting me as their teaching assistant in PIL and IR, and to the students.

At Durham Law School a special mention goes to Rumy Grozdanova, Jane Rooney, Ntina Tzouvala, Angie Engel, Anna Jobe and Sohyun Shin, and honorary member Matt Hann. Around Durham, Emma Black, Chris Davidson, Hadi El-Amine, Sandra Ernst, Anna Kranz, Emma Linney, Celine Ophelders, Jesper Pedersen, Renan Petersen-Wagner, Seif El-Rashidi, Miriah Reynolds, Nussaibah Younis. Further afield, to my closest friends Kai Kreutzberger and Enrica Locati in particular, and to Beatrice Bono, Caterina Crivellaro, Katy Rota, Fabrizio Saglia, Chiara Sasso and Shimri Zameret.

I especially thank Cesare Aloisi for supporting my independence.

This thesis is dedicated to my mother and aunt, Ms Kate Merrett and Ms Tess Merrett, and to the other Ms Panepinto, my sister Lydia.

Table of Contents

Introduction

The Arab Uprisings have sparked an interest in the potential of transitional justice across North Africa and the Middle East. This prospect raises the doctrinal question of how to transfer the international paradigm of transitional justice (TJ) into a local setting characterised by a Muslim-majority population. Are the rules of public international law (PIL), international human rights, criminal law and humanitarian law (IHRL, ICL and IHL) the only relevant sources for TJ processes in those contexts? Or can the localisation of TJ draw on a wider range of norms, including unofficial and religious laws? This thesis provides a nuanced analysis of the relocation of TJ from the international paradigm to Muslim-majority legal systems and investigates the possible synergies between PIL and Islamic law in furthering the transitional aims of accountability, justice and reconciliation. In particular, it investigates the key themes of the international paradigm of TJ – truth-seeking, the formation of collective memories and the victims' right to know the truth – in relation to Islamic jurisprudence and practice.[1]

Since its establishment as a field, the greatest challenge for transitional justice has been the reconciliation between the overarching international framework of reference and the local unofficial norms that inform its applicability in specific contexts. This tension has brought to light 'the disconnections between international legal norms and local priorities and practices', destabilising 'the orthodox transitional justice paradigm',[2] towards the potential creation of 'a truly inclusive transitional justice paradigm'.[3] While the relativism v universality debate in international law and human rights continues to pose a conceptual hurdle to the localisation of TJ, this research demonstrates it is not insurmountable. Moreover, the interaction between international laws and local norms applicable to TJ processes in Muslim-majority settings may help develop a global paradigm which does not restrict itself to PIL and official state law.

This thesis contributes to the quest for the connection and the connecting of international law and local norms in the developing global framework of reference for transitional justice. It considers how unofficial rules and normative principles relevant to communities facing transitions can support applicable international laws. It does not specifically look at the role of formal state law which is typically contested in times of transition: instead, the focus of this work is on PIL and informal norms. Drawing on comparative methods to reassess the relativism v universality debate, this research reviews the key concepts and approaches for relocating TJ from international law to specific settings, and then tests those propositions in relation to Muslim-majority legal systems. The research problems set out grapple with the tension between different rules applicable to TJ in pursuit of accountability, justice and reconciliation after a history of serious abuse. As well as offering theoretical insights into the topic for both lawyers and other scholars, this work also has a

---

[1] In brief, the phrase 'Muslim-majority settings' describes contexts where the majority of the community identifies as Muslim in a spiritual/cultural way and may be guided by Islamic law (*shari'ah*). 'Muslim-majority legal systems' are the legal systems of such communities, even when the state law is secular (e.g. Turkey). The terms Islamic law and *shari'ah* include the norms, jurisprudence and legal practice related to the Muslim religion.

[2] Rosalind Shaw and Lars Waldorf (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press 2010), 3 et seq

[3] Lieselotte Viaene and Eva Brems, 'Transitional justice and cultural contexts: learning from the Universality debate' (2010) 28(2) *NQHR* 199, 224

practical application in informing the way we think legally and politically about the design and implementation of transitional justice in specific contexts.

Research Questions

This research seeks to reflect on two intertwined questions: How can we interpret the relocation of TJ from an international paradigm (based on PIL) to local settings? And how do norms emerging from local settings inform a more global paradigm of TJ (based on a broader set of norms than PIL)? In exploring these issues, this study will consider in particular whether truth-seeking, the formation of collective memories and the victims' right to know the truth – the cornerstones of the international paradigm of TJ – are equally significant in Muslim-majority legal systems, investigated as an example of a local setting.

The aim of this thesis is to provide further insight into the challenges of relocating TJ concepts and tools from international law to local settings, testing some of the key concepts in relation to Muslim-majority legal systems. In particular, this work seeks to critically reassess the normative framework of TJ based on formal international law and considers the contribution to that paradigm by informal unofficial local laws based on the cultures, customs, traditions and religions of the surviving communities. This work explores whether the development of a global law of TJ may draw from the local norms that give bottom-up credence to top-down international law rules. By adopting the under-utilised perspectives of comparative law, this research also probes the potential of comparative methods in understanding local norms and employing them creatively to support the aims of transitional justice (accountability, justice and reconciliation).

In developing the analysis, two intertwined critical perspectives on embracing local norms will be explored. Firstly, caution must be exercised to avoid exacerbating power dynamics imposed by both international and local norms, which may operate as a sophisticated instrument of power and violence, especially in fragile transitional contexts. Secondly, as the primary moral stakeholders of TJ are the victims and survivors of past abuse, it is crucial to give them a voice in the development of TJ. For this reason, truth-seeking activities and the formation of collective memories are understood in this thesis as closely connected to the victims' right to know the truth and instigate judicial proceedings and extrajudicial mechanisms as part of the process. The right to the truth, therefore, may help apportion responsibilities for past abuse, and at the same time support the emancipation of previously marginalised groups and individuals.

Methodology

Drawing on Sacco's methods of comparative law, this thesis interprets the legal formants and cryptotypes of societies experiencing TJ.[4] This approach helps explore two possibilities: firstly, it enables the translation of the international paradigm of TJ (based on PIL) to local settings through a critical comparative appraisal of what specific rules seek to achieve. Secondly, it facilitates the contribution of local rules to the establishment of a global paradigm of TJ based on PIL as well as on cross-cultural appreciation of norms, linked to notions of *jus commune* and *jus gentium*.[5] This creative use of comparative law seeks to bring to light the coexistence

---

[4] On these comparative law concepts, Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (Instalment I of II) and (Instalment II of II) (1991) 39 *Am J Comp L* 1 and 343

[5] See e.g. Jeremy Waldron, 'Foreign Law and the Modern Jus Gentium' (2005) 119(1) *Harv L Rev* 129; and Paolo Carozza, ''My Friend is a Stranger': The Death Penalty and the Global Ius Commune of Human Rights' (2003) 81 *Texas L Rev* 1031

of different norms in understanding the localisation of TJ; it thus makes use of existing and new synergies to pursue the transitional aims of accountability, justice and reconciliation more effectively on the basis of a variety of sources.

The research conducted for this project is mostly desk-based, chosen as the most appropriate means to consider the theoretical questions and aims of this thesis. The Islamic law sources and commentaries reviewed are in English as this author is not fluent in Arabic. As the events of the Arab Uprisings were unfolding in parallel to this study, the possibility to conduct fieldwork and interview stakeholders of those nascent TJ processes was dismissed because the temporal proximity of events rendered them too fluid to enable a meaningful analysis. Moreover, the subject-matter of this law-oriented thesis did not require first-hand ethnographic inquiry in situ or participant observation. Nevertheless, the direction of this work was informed by participation in numerous conferences, workshops and events for academics and practitioners in Europe and the Middle East, where I was able to situate my ideas within the broader debate on applying transitional justice in specific settings, including Muslim-majority ones. The informal conversations in those circumstances, while not structured as part of the methodology, were of great use in developing the thesis and articulating its key arguments.

Can Transitional Justice Relocate to 'Muslim-majority' contexts?

The term 'context' is used in this thesis to indicate the discrete setting in which TJ operates that can be analysed through a legal lens or from the perspective of other disciplines; whereas the specific phrase 'legal system', borrowed from comparative legal studies,[6] describes the complex interplay between norms, practices and actors of a given context that affect how the law operates (referred to by Rodolfo Sacco as 'legal formants'[7]). A careful examination of all applicable norms in societies facing transition is required to ensure the formalisms of international law and official domestic law (not addressed in this thesis) do not eclipse relevant local unofficial law. In order to analyse the local rules that govern a community experiencing TJ, the perspectives of international law and human rights can be complemented by the interdisciplinary perspectives of socio-legal studies, legal anthropology, IR, legal and political theory, and even cultural, religious and theatre studies. In that regard, the methods of comparative law offer a range of analytical tools to interpret the complex interaction between competing norms, which in turn helps understand how TJ can be relocated from its international paradigm to local, Muslim-majority settings.

Another notable feature of the study of transitional justice is the context of legal pluralism, where international law coexists with a potentially infinite inventory of local norms – including unofficial, informal, religious, traditional and customary rules.[8] The gradual dominance of international law in this field has sought to provide a uniform set of guidelines for global policymakers, national leaders and local actors dealing with a legacy of gross human rights violations during authoritarianism, conflict and other forms of past violence. Yet, international law (and its agents and proponents) cannot afford to turn a blind eye to local rules and conceptions of justice, as this implies the imposition of an inadequate form of TJ from the outside, and the obscuring of the the role played by local noms. Alongside the more distant notion of international

[6] Rene David and E.C. Brierley, *The Major Legal Systems of the World Today* (Stevens and Sons 1985)
[7] Sacco, 'Legal Formants'
[8] Sally E Merry, 'Legal Pluralism' (1988) 22 *L & Soc Rev* 869

law, the language and cultural familiarity of local norms are more likely to resonate with survivors; the two sets of norms, moreover, cannot be presumed to clash, though disagreements can surface and cannot be ignored. Thus, both external and internal stakeholders of TJ initiatives will find it worthwhile to engage with local, unofficial and informal norms that guide the social behaviour of communities, alongside the emerging international framework of reference.

The subject-matter of this thesis – localising transitional justice from international law to specific settings – finds a contemporary application in the context of the Arab Uprisings, in which Muslim-majority populations are facing a political shift, legacies of institutional violence and socio-economic injustices. This research identifies and analyses some of the main issues and tensions within the pluralistic legal systems of those contexts, in which international law, local norms and Islamic principles coexist, and face questions of transitional justice as a complex whole. In light of legal pluralism, considering the potential of comparative law helps understand how transitional justice is relocated from international law to specific settings, which then presents Muslim-majority legal systems as an example of a much broader issue. These topics require consideration for their political significance, and this thesis provides a fresh take on the main concepts and approaches to shed addition light on the localisation of TJ from the global to the local level.

Structure

This thesis interrogates the main issues in relocating transitional justice from international law to a local setting, and in particular in Muslim-majority legal systems, over six substantive chapters, each addressing a specific sub-issue of the overall research question. This structure traces the steps taken to unravel the research question: after setting out the key concepts of the international paradigm of TJ, it explores truth-seeking, collective memories and the right to the truth as cornerstone notions. Then, it sets out the comparative tools that help relocate TJ, critically explores Muslim-majority legal systems and finally tests the international paradigm of TJ – and in particular the means to uncover the truth – vis-à-vis Islamic law.

What are the rules of transitional justice? The first chapter introduces transitional justice and its distinctive concepts, presenting an overview of its applicable rules within a context of legal pluralism. In particular, it critically discusses the core applicable provisions of international criminal, human rights and humanitarian law, also addressing the rule of law dilemma[9] and the links with peace and development,[10] before addressing the role of local norms. This reading captures the social and political power dynamics between those who shape the process and the beneficiaries, uncovering the instrumental uses of culture, tradition and religion alongside the rules of international law that may all shape transitional justice.

How does the law shape collective memories of violence? The second chapter addresses the role of the truth in transitional justice with regards to the formation of historical narratives that impact the core aims of accountability, justice and reconciliation. The process of uncovering the truth about historical violence potentially sets in motion the sanctioning of perpetrators, victims' reparations and psychological healing, as well as institutional reform. In particular, this part explores the distinctive features of the legal truth (separate

[9] Notably, Ruti G. Teitel, *Transitional Justice* (OUP 2000)

[10] Inter alia, Louise Arbour, 'Economic and social justice for societies in transition' (2007-2008) 40 *NYU J Intl L & Pol* 1; Rama Mani, 'Dilemmas of expanding transitional justice, or forging the nexus between transitional justice and development' (2008) 2(3) *IJTJ* 253.

from historical/factual truth) constructed through formal truth-seeking processes like trials and truth commissions,[11] which shape collective memories of past abuse.

Which international instruments enable survivors to access the truth? The third chapter examines the emerging right to the truth under international law. It provides a comparative appraisal of global instruments and the jurisprudence of the Inter-American and European human rights systems, and considers the significance of the recent *El-Masri* judgment.[12] Based on the role of the judiciary in articulating the legal truth discussed in the previous chapter, the right to the truth is viewed from an individual and a collective perspective in transitional contexts and, more broadly, in situations of strained rule of law.

Which conceptual tools help localise TJ? The fourth chapter explores the possibilities of comparative law in assisting with the localisation of transitional justice as well as in outlining a global set of rules for transitional justice that takes stock of a context of legal pluralism and draws from a variety of sources. Given its focus on understanding the complex workings of legal systems as opposed to only finding solutions to problems, comparative law is suited to the critical study of local settings in which the international paradigm of TJ may be localised. By using comparative law strategically, international lawyers may also be able to contribute further to the developing global paradigm (*jus commune/jus gentium*) of TJ.

What are Muslim-majority legal systems? The fifth chapter evaluates the key features of Islamic law with a view to relocating transitional justice from international law to Muslim-majority settings, exploring how contemporary legal systems are influenced by *shari'ah*, both organically and through the agency of certain institutions and individuals.[13] Building on the analysis set out in the previous chapter, it discusses the tradition and practice of Islamic law – which falls short of constituting a discrete and organic corpus of law – as legal formant of Muslim-majority legal systems capable of influencing rules both from the top-down and the bottom-up. This chapter also presents an example of how religious institutions have creatively reinterpreted the sources to respond to the pressing socio-political realities of transitional justice in the context of the Arab Uprisings.

How does TJ and its particular truth-seeking aim translate into Muslim-majority contexts? The sixth, and final, chapter brings together the ideas discussed in the previous chapters in relation to Islamic law. It discusses the localisation of some of the core aspects of the international paradigm of TJ in Muslim-majority legal systems – especially the notion of legal truth and the emerging right to the truth. It also looks at how Islamic law and practice compare to TJ concepts based on PIL, but also how it may contribute to an emerging global paradigm of TJ that looks beyond official state laws. By assessing the overlap between the substantive and procedural principles of Islamic law with IHRL and ICL,[14] it explores how the concept of legal truth in the Islamic legal tradition may contribute to the international right to the truth as a component of the global paradigm of TJ.

---

[11] See, respectively, Robert S Summers, 'Formal legal truth and substantive truth in judicial fact-finding – their justified divergence in some particular cases' (1999) 18 *Law and Philosophy* 497; and Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2011)

[12] *El-Masri v FYRM,* App. No. 39630/09 (ECHR, 13 December 2012), para 191

[13] On the normative force of shari'ah see Baudouin Dupret, 'La sharî'a comme référent législatif' (1995) 34 *Revue interdisciplinaire d'études juridiques* 99

[14] Inter alia Mashood A. Baderin, *International human rights and Islamic law* (OUP 2003)

Ways Forward

Responding to the pressing need to rethink the rules of this field as a combination of global and local norms, this study offers a fresh insight into the relocation of transitional justice from international law to specific settings, and in particular Muslim-majority contexts. Through a comparative law lens, this thesis uncovers some of the peculiarities of Islamic law as an example of how local norms are able to accommodate the international paradigm of TJ. Truth-seeking, the formation of collective memories and the right to the truth provide some insight into how substantive and procedural rules overlap in TJ and Islamic law and can be used to further transitional aims as part of the relocation process. That discussion also points to how local norms contribute to the formation of global rules of TJ, which may be enriched by a more diverse set of norms drawn across different legal systems and traditions.

This research reveals an overall cross-fertilisation between international law and local norms in TJ at local level as well as globally, minimising the relativism v universality cliché. In fact, by deliberately ignoring unofficial norms in the relocation of TJ, the international paradigm of TJ is unlikely to attain global significance and recognition across different societies. Islamic law – and many other unofficial norms – may contribute to the global paradigm of TJ that in turn reflects the possibility of a *jus commune/jus gentium* of TJ which no longer relies on state law and instead is more responsive to informal norms. Indeed, where the application of state law is suspended due to its violent and oppressive use in the past, transitional contexts face a normative gap at local level that could be partly filled partly by unofficial norms. This study on the relocation of TJ to Muslim-majority legal systems explores the possibility of PIL furthering the transitional aims of accountability, justice and reconciliation as understood in local norms, which in turn feed into the emerging global paradigm of TJ, where the right to the truth is instrumental in building collective memories of a violent past.

Postscripts:

1. Arabic terms are transliterated in simplified form to facilitate legibility.

2. Journals and publishers are frequently cited in their common abbreviated form.

I. A Re-Introduction to Transitional Justice: Distinctive Concepts, International Law and Local Norms

1. Introduction

Societies[1] facing a legacy of gross human rights violations during authoritarianism, conflict or other forms of violence, including economic violence,[2] have sought to creatively design and implement means to address systematic past abuses. Participants in transitional justice (TJ) processes, survivors (victims and perpetrators) as well as international actors, have creatively adapted and interpreted existing sources of law to the aims of transition. International law and local conceptions of justice, taken together, have attempted to address the past and set out a more just future, based on a decent standard of living, freedom from violence and the possibility of participation in the political life of a community. The distinctive force of transitional justice is to rebuild the future by uncovering and challenging the past, through mechanisms such as trials, truth commissions, lustrations, amnesties, institutional reform and constitutional adjustments (to name a few).

Transitional justice has become a catch-all phrase to describe the dynamic composite processes of policies and mechanisms that seek to address the legacy of serious abuse carried out in authoritarian regimes or conflicts. However, transitional justice also carries a distinctive conception of law and legality linked to periods of radical political change. The UN-defined goals of transitional justice – accountability, justice and reconciliation – can be achieved through a variety of means, some of which require a flexible approach to the applicable legal framework in deference to political necessities. For that reason, the discovery of the truth about a legacy of abuse, and the possibility to manage competing narratives about the past, forms the starting point for change. Transitional justice therefore tries to systematise 'knowledge about the cause-and-effect relationships between justice measures and transitions'.[3] As truths are uncovered, responsibilities apportioned, and the foundations for a more just community are laid as part of TJ processes, individuals, communities and states start facing the past.[4]

This chapter presents the distinctive concepts of transitional justice and its pluralistic normative framework, which, notably, synthesise different branches of international law and unofficial norms of a given context, alongside domestic rules (which are not addressed directly in this thesis). After introducing transitional justice, it will address international criminal, human rights and humanitarian law (ICL, IHRL and IHL) as components of its framework of reference. Finally, it will consider how legal pluralism informs TJ through a range of applicable local norms, which may promote a sense of cultural ownership by survivors. This perspective captures the social structures and power struggles of the actors that shape each transitional justice process, in which strategic applications of law coexist with political uses of culture, tradition and religion.

---

[1] An earlier version of this chapter is published as A. Panepinto, 'Transitional Justice: International Criminal Law and Beyond' (2014) 3 *Archivio Penale*

[2] See for instance, Michael Pugh, 'The political economy of peacebuilding: a critical theory perspective' (2005) 10(2) *International Journal of Peace Studies* 23

[3] Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice', (2009) 31 *HRQ* 321, 358

[4] For an overview of the different levels of TJ, inter alia: Judy Barsalou, 'Trauma and transitional justice in divided societies' (2005) *United States Institute for Peace Special Report* 135; Jon Elster, 'Emotions and transitional justice' (2003) *Soundings* 17; Oskar NT Thoms, James Ron, and Roland Paris, 'State-level effects of transitional justice: What do we know?' (2010) 4(3) *IJTJ* 329; David Mendeloff, 'Trauma and vengeance: Assessing the psychological and emotional effects of post-conflict justice' (2009) 31(1) *HRQ* 592; Kevin Avruch, 'Truth and reconciliation commissions: Problems in transitional justice and the reconstruction of identity' (2010) 47(1) *Transcultural Psychiatry* 33; Rama Mani, 'Dilemmas of expanding transitional justice, or forging the nexus between transitional justice and development' (2008) 2(3) *IJTJ* 253

2. Transitional Justice: A Re-Introduction

For lawyers as well as non-lawyers 'transitional justice' has become a panacea for addressing the legacy of grave and widespread human rights abuses, applicable to both post-authoritarianism and post-conflict situations.[5] One of its principal advocates describes it as 'a universal policy tool' that 'resolves an apparently endless number of problems'.[6] Indeed, a variety of both ordinary and extraordinary mechanisms, processes and policies fall within the scope of transitional justice.[7] This section provides a critical overview of the current understandings of transitional justice, its definitions, laws and applications, and lists its main aims and mechanisms to achieve them.

It has been noted that definitions of transitional justice reflect two – not necessarily competing – approaches to the topic. The first indicates an umbrella term for the 'full range of processes and mechanisms' that make up TJ, while the latter captures the more theoretical 'modified notion of justice inherent in these policies'.[8] Notably, the UN describes transitional justice as:

> The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include judicial and non-judicial mechanisms, with different levels of national involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.[9]

This definition recognises transitional justice not as a static moment or act, but as a dynamic, on-going process originating from a society's willingness to confront egregious past violations of rights. This process comprises three specific and mutually reinforcing aims: ensuring accountability, serving justice and achieving reconciliation. It encompasses both judicial means and non-judicial means, at domestic, regional and international levels. Therefore, any given TJ process may include a combination of the following

---

[5] On TJ and post-authoritarianism/democratisation, inter alia: Neil J Kritz (ed), *Transitional justice: how emerging democracies reckon with former regimes* (United States Institute of Peace Press 1995); Luc Huyse 'Justice after transition: On the choices successor elites make in dealing with the past' (1995) 20(1) *Law & Social Inquiry* 51; with reference to post-conflict/peacebuilding, inter alia: Wendy Lambourne, 'Transitional justice and peacebuilding after mass violence' (2009) 3(1) *IJTJ* 28; Chandra Lekha Sriram, 'Justice as peace? Liberal peacebuilding and strategies of transitional justice' (2007) 21(4) *Global society* 579

[6] Pablo de Greiff, 'Some Thoughts on the Development and Present State of Transitional Justice', (2011) 5(2) *Journal for Human Rights/Zeitschrift für Menschenrechte* 98

[7] For a general discussion on this, inter alia: Eric A Posner and Adrian Vermeule, 'Transitional justice as ordinary justice' (2004) 117 *Harv L Rev* 761; Miriam J Aukerman, 'Extraordinary evil, ordinary crime: A framework for understanding transitional justice' (2002) 15 *Harv Hum Rts J* 39

[8] James A. Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (Routledge 2013), 22. For an example of transitional justice as an umbrella term, Lutz Oette, 'Law reform in times of peace processes and transitional justice: The Sudanese dimension' in Lutz Oette (ed), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Ashgate 2013), 18.

[9] Notably, in: United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict situations: Report of the Secretary General,* (23 August 2004) S/2004/616, as also discussed in Sweeney, *The ECHR in the Post-Cold War Era*, 22

measures: successor trials (both criminal and non-criminal), truth commissions,[10] lustrations (vetting),[11] restorative measures (reparations, restitutions, etc),[12] constitutional and legal reform,[13] reforming the security sector,[14] opening and making secret files accessible, memorialisations,[15] public apologies,[16] state-building (and trust-building) activities,[17] amnesties,[18] and more, linked to the rule of law,[19] democratisation and human rights promotion.

The second approach is more theoretical than the first, focusing on the distinctiveness of transitional justice as a concept rather than on its mechanisms. Writing in his academic capacity, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence Pablo de Greiff has noted that 'in the wake of massive abuses, some of the 'ordinary' expectations concerning what justice requires will not be satisfied'.[20] Discussing its key peculiarities, Ruti Teitel has famously described transitional justice as 'caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective', spanning between the past regime, and the desired (liberal) shift.[21] Others have also suggested that transitional justice tends to serve interim purposes rather than permanent goals,[22] indicating its time-span as one of its distinctive features.

---

[10] On this see inter alia: Priscilla B Hayner, *Unspeakable truths: Facing the challenge of truth commissions* (Vol. 21, Routledge 2002); Hayner, 'Fifteen truth commissions-1974 to 1994: A comparative study' (1994) 16 *Hum Rts Q* 597; Stephan Landsman, 'Alternative responses to serious human rights abuses: of prosecution and truth commissions' (1996) *Law and Contemporary Problems* 81

[11] Inter alia: Pablo de Greiff, 'Vetting and transitional justice' (2007) in Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice As Prevention: Vetting Public Employees in Transitional Societies* (New York: Social Science Research Council 2007) 522

[12] Inter alia: Jennifer J Llewellyn, and Robert Howse, 'Institutions for restorative justice: The South African truth and reconciliation commission' (1999) *University of Toronto LJ* 355; Kieran McEvoy and Harry Mika, 'Restorative justice and the critique of informalism in Northern Ireland' (2002) 42(3) *British Journal of Criminology* 534; Roman David and Susanne YP Choi, 'Victims of transitional justice: Lessons from the reparation of human rights abuses in the Czech Republic' (2005) 27(2) *HRQ* 392; Tom Allen, 'Restitution and Transitional Justice in the European Court of Human Rights' (2006) 13 *Colum J Eur L* 1

[13] Inter alia: Ulrich K. Preuss, 'Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization' (2006) 51 *NYL Sch L Rev* 467; Donald L. Horowitz, 'Conciliatory institutions and constitutional processes in post-conflict states' (2007) 49 *Wm & Mary L Rev* 1213

[14] Inter alia: Herbert Wulf, 'Security sector reform in developing and transitional countries' in Clem McCartney, Martina Fischer and Oliver Wils (eds), *Security Sector Reform: Potential and Challenges for Conflict Transformation* (Berlin: The Berghof Handbook Dialogue Series No. 2, 2004)

[15] Inter alia: Judith Marie Barsalou and Victoria Baxter, *The urge to remember: the role of memorials in social reconstruction and transitional justice* (United States Institute of Peace 2007)

[16] Inter alia: Catherine Jenkins 'Taking Apology Seriously', in M du Plessis, and S Pete (eds), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (Intersentia 2007)

[17] Inter alia: Elizabeth A. Cole, 'Transitional justice and the reform of history education' (2007) 1(1) *IJTJ* 115

[18] Inter alia: Louise Mallinder, *Amnesty, human rights and political transitions: bridging the peace and justice divide* (Hart Publishing 2008); Lisa J. Laplante, 'Outlawing amnesty: the return of criminal justice in transitional justice schemes' (2008) 49 *Va J Intl L* 915; Kieran McEvoy and Louise Mallinder, 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy' (2012) 39(3) *J Law & Soc* 410

[19] On this, inter alia: Padraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship* (Routledge 2013)

[20] P de Greiff, 'Theorizing transitional justice', in Jon Elster, Rosemary Nagy and Melissa Williams (eds) *Transitional Justice: Nomos LI* (NYU Press 2012) 31, 58

[21] Ruti G. Teitel, *Transitional Justice* (OUP 2000), 5-6

[22] C L Sriram, *Confronting past human rights violations* (Routledge 2004) discussed in Bronwyn Anne Leebaw, 'The irreconcilable goals of transitional justice' (2008) 30(1) *HRQ* 95, 118

Political contexts also affect the peculiarities of transitional justice. Historically, it is linked to events such as post-World War II trials, the dissolution of the USSR and the shift away from authoritarianism in Latin America (in more general terms, the 'third wave of democratisation'[23]).[24] Its connection to democratisation and nation-building reaffirms it political nature.[25] This is because:

> Transitional justice mechanisms aspire to catalyze processes of deep social change at the global, national and local levels, transitional justice, by its very nature, dwells in the realm of politics and public affairs.[26]

Politics remains a key aspect of current 'steady-state' transitional justice, characterised by the normalisation of previously very exceptional measures.[27] Teitel argues that the establishment of the International Criminal Court (ICC) has entrenched the 'Nuremberg model' through 'the creation of a permanent international tribunal appointed to prosecute war crimes, genocide, and crimes against humanity as a routine matter under international law',[28] which still does not subtract transitional justice from the realm of politics and certainly does not equate it to ICL.

In general, transitional justice is the 'conception of justice associated with periods of political change',[29] described by Teitel as the 'self-conscious construction of a distinctive conception of justice associated with periods of radical political change following past oppressive rule'.[30] This suggests that the very notion of justice in times of political transition is modified – regardless of whether the mechanisms adopted are ordinary (such as trials) or extraordinary (such as truth commissions or amnesties). In this context, politics inform the norms applicable to transitions,[31] and at the same time the law shapes the political transformation.[32] Teitel recognises these normative shifts as a defining feature of transitions, whereby 'legal practices bridge a persistent struggle between two points: adherence to established convention and radical transformation'.[33] As such, transitional justice balances elements of continuity and change.

The lack of 'clear rules and criteria' to guide transitional justice has pressed scholars such as Kai Ambos to call for a 'judicializ[ation of] the politics of transitional justice',[34] which is gradually happening through international law's dominance of the field. But while international law undoubtedly provides a framework of reference, it is less suited to evaluating the impact of transitional justice on the proposed beneficiaries. Political criteria are still more likely to guide assessments of transitional justice (e.g. the effectiveness of

---

[23] Samuel P Huntington, *The third wave: democratization in the late twentieth century* (1991).

[24] Teitel has discussed this in various works: 'Transitional justice genealogy' (2003) 16 *Harv Hum Rts J* 69; 'Editorial Note: Transitional Justice Globalized' (2008) 2 *IJTJ* 1; and 'How are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses?' in Kritz (ed), *Transitional Justice*

[25] 'Transitional justice genealogy', 71, 76; R Teitel, 'The law and politics of contemporary transitional justice' (2005) 38 *Cornell Intl LJ* 837

[26] Colleen Duggan, 'Editorial Note' (2010) 4(3) *IJTJ* 315

[27] Teitel, 'Transitional justice genealogy', 89

[28] Ibid, 90

[29] Teitel, *Transitional Justice*, 3

[30] Teitel, 'Editorial Note', 1

[31] Ibid, 2, and Teitel, *Transitional Justice*, 4

[32] R Teitel, 'Transitional Justice: post war legacies' (2005-2006) 27 *Cardozo Law Review 1615*, 1616 et seq

[33] Teitel, *Transitional Justice*, 215

[34] Kai Ambos, *The legal framework of transitional justice: a systematic study with a special focus on the role of the ICC* (Springer, 2009), 14, quoting Ivan Orozco

political reforms, democratic process, judicial system, etc).[35] Moreover, the results may only show in the long term.[36] As such, cognate disciplines beyond law and politics may assist in the evaluation task and highlight some of the problems of TJ.

Acknowledging the difficulties of measuring transitional justice, Colleen Duggan identifies three broad types of challenges: conceptual, contextual and practical.[37] In particular, a 'host of social justice goals that are usually ascribed to international development' as well as donor-driven evaluation parameters may fail to understand whether the needs of the beneficiaries have been met.[38] Identifying the victims[39] and giving them a voice in 'victim-oriented model of social reconstruction for transitional countries' is essential but not easy.[40] Moreover, time poses additional issues: many evaluation methods and impact assessments are unsuited to capturing the gradual, subtle and long-term effects of transitional justice.[41]

In light of the lack of clear rules and uncertain evaluation criteria, it is crucial to remain mindful of the limitations of transitional justice. Kai Ambos describes justice in the context of transitions as 'an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs'.[42] This romantic vision has seen TJ evolve from its original applications in the context of post-authoritarianism,[43] to post-conflict scenarios,[44] and even in ongoing conflict.[45] Today, it has found a place on the international peace and security agenda at the UN Security Council.[46] But transitional justice may lose its

---

[35] Ibid, 7

[36] Regarding gradual, subtle, long term effects, see de Greiff, 'Some Thoughts on the Development and Present State of Transitional Justice', 103

[37] Duggan, 'Editorial Note'

[38] Ibid. For an example of results-based management in development, see United Nations Development Group, Results-based Management handbook (October 2011), available at http://www.undg.org/docs/12316/UNDG-RBM%20Handbook-2012.pdf [accessed 30 Jan 2014]. On the challenges of human rights and development, see inter alia, Philip Alston, 'Ships passing in the night: the current state of the human rights and development debate seen through the lens of the Millennium Development Goals' (2005) 27(3) *HRQ* 755

[39] For example, Tshepo Madlingozi, 'On transitional justice entrepreneurs and the production of victims' (2010) 2(2) *Journal of Human Rights Practice* 208

[40] Inter alia, David and Choi, 'Victims of transitional justice'

[41] De Greiff, 'Some Thoughts on the Development and Present State of Transitional Justice', 103

[42] Ambos, *The legal framework of transitional justice*, 7, referring to the 2004 Report of the UN SG on Transitional Justice para 7

[43] De Greiff, 'Some Thoughts on the Development and Present State of Transitional Justice', 110. See also 'second phase' transitional justice in Teitel, 'Transitional justice genealogy'

[44] See on this inter alia Paul van Zyl, 'Promoting transitional justice in post-conflict societies' in Alan Bryden and Heiner Hänggi (eds) *Security and Governance in Post-Conflict Peacebuilding* (Geneva Centre for the Democratic Control of Armed Forces 2005); Eirin Mobekk, 'Transitional Justice in Post-Conflict Societies–Approaches to Reconciliation' in Anja H. Ebnother and Philipp H. Fluri (ed) *After Intervention: Public Security Management in Post Conflict Societies-from Intervention to Sustainable Local Ownership* (Vienna: Bureau for Security Policy at the Austrian Ministry of Defence 2005); Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity/Blackwell 2002)

[45] On this point, see, inter alia: Par Engstrom, 'Transitional Justice and Ongoing Conflict' in Chandra Lekha Sriram et al (eds), *Transitional justice and peacebuilding on the ground: Victims and ex-combatants* (London: Routledge, 2012); Lisa J Laplante, and Kimberly Theidon, 'Transitional justice in times of conflict: Colombia's Ley de Justicia y Paz' (2006) 28 *Mich J Intl L* 49

[46] Secretary-General Ban Ki-moon, Security Council, 18 October 2013, Remarks at Security Council open debate on Women, Rule of Law and Transitional Justice in Conflict-Affected Situations, available at: https://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=2031#.UxuDh3m73FI [accessed 5th February 2014].

[47] De Greiff, 'Some Thoughts on the Development and Present State of Transitional Justice', 109

intended purpose if stretched too far,[47] because the progressive enlargement of its agenda is likely to disappoint the expectations of surviving beneficiaries (and eventually even donors).

In brief, transitional justice can be understood as a range of mechanisms and policies associated with a society's desire to face a legacy of past abuse at times of radical political change, as well as the distinctive notion of justice associated with those aims in transitional contexts. Its ambitious aims are accountability (truth), justice and reconciliation, which are pursued by both judicial and extrajudicial means, notably including trials, truth commissions, inquiries and vetting. More broadly, however, the social justice goals of transitional justice merge with developmental aspirations of political reform and redistribution of resources as well as power, which are almost impossible to measure from a legal angle alone. The steady-state transitional justice established by the creation of permanent bodies under international criminal law (ICL) may not, therefore, be a sufficient framework of reference for the discipline. The sections that follow will discuss the contributions of ICL and human rights to understandings of transitional justice based on international law, and then provide an analysis of the complementary legal sources that may inform the process locally.

3. Transitional Justice and International Criminal Law

In light of the previous discussion, the focus of this section will be the relationship between transitional justice and international criminal law (ICL). Criminal trials at domestic and international level constitute a common feature of TJ and often coexist with other mechanisms, such as truth commissions. Nevertheless, tensions between competing transitional aims of reconciliation and accountability (which includes criminal retribution) have been identified within broader debates of 'truth v justice'.[48] But the coexistence of reconciliation and retribution within TJ suggests, instead, that these two aims are complementary.[49] As such, the function and applications of criminal trials is informed by the range of transitional aims of accountability, justice and reconciliation.

A recurrent problem of criminal trials in TJ is that they may be 'show trials, unbefitting a democracy' and concealing 'manifestations of victor's justice'.[50] In the context of current steady-state transitional justice,[51] ICL has become a key component of the applicable legal framework, exposing even the ICC to such criticism. Against this backdrop, the greater emphasis on fair trial guarantees and victim's rights in international human rights law (IHRL) – which permeates and is also capable of triggering criminal justice[52] – may temper some excessively punitive effects of penal law.

Naomi Roht-Arriaza identifies two main approaches to understanding the relationship between transitional justice and ICL.[53] On the one hand, their interrelation is based on transitional justice functioning as a precursor to ICL, filling in gaps or providing alternatives to prosecutions, for example through reparations.[54] On the other hand, the two may run parallel to each other, as ICL seeks primarily to 'enforce the law' regardless of the circumstances,[55] whereas transitional justice commands greater flexibility. Both approaches and a shared history inform the special relationship between transitional justice and ICL. And precisely because international criminal justice as a field 'has developed at the intersection of interstate diplomacy, criminal justice and human rights advocacy', it remains powerful in transitional justice.[56]

---

[48] See, in general: Naomi Roht-Arriaza, Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (CUP 2006)

[49] For example David Little, 'A Different Kind of Justice: Dealing with Human Rights Violations in Transitional Societies' (1999) 13(1) *Ethics & International Affairs* 65

[50] Kritz, *The Dilemmas of Transitional Justice,* in Kritz (ed) *Transitional Justice*, xxi

[51] Teitel, 'Transitional justice genealogy', 90

[52] Francoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 J Intl Crim Justice 577, also referencing at 585 et seq: *X and Y v The Netherlands* App no 8978/80 (ECHR 26 March 1985) and *Yasa v. Turkey* App No 63/1997/847/1054 (ECHR 2 Sept 1998)

[53] Naomi Roht-Arriaza, 'Editorial Note' (2013) 7 IJTJ (2013) 383, 390

[54] Ibid, 389

[55] Ibid.

[56] P Dixon and C Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims' (2013) 7 *IJTJ* 393, 411 et seq

The Nuremberg Trials[57] at the end of the Second World War catalysed 'the first phase of transitional justice'.[58] At the same time ICL and IHRL were also developing.[59] 'The turn to international criminal law and the extension of its applicability beyond the state to the individual' to separate state and personal accountability provided new opportunities to deal with past abuse.[60] After a pause during the Cold War, ICL reclaimed centrality in transitional justice in the 1990s, first through the *ad hoc* tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), then with the establishment of the ICC. This phase is characterised by continuity expressed in the provisions of the Rome Statute and the existence of a permanent criminal tribunal of international character leading to the concept of steady-state transitional justice.

In light of these developments, some have called for a more proactive leadership of the ICC in coordinating transitional justice initiatives,[61] although scepticism surrounding the ICC would commend extreme caution in that regard.[62] Most notably, Security Council (UNSC) referrals to the ICC through UN Charter Chapter VII resolutions highlight the political risks in establishing links between grave human rights abuses and international peace and security issues.[63] To date, this has occurred only in relation to Darfur (Sudan) and Libya.[64] Thus, as UNSC referrals to the ICC remain sensitive,[65] their use in relation to transitional justice should be extremely cautious. Likewise, other routes to activate the ICC's jurisdiction – state referral and *proprio motu* initiatives by the Prosecutor – though based on a state's formal acceptance of jurisdiction, may conceal power dynamics and new patters of socio-political oppression (especially in fragile states) that a global criminal court should navigate carefully. It has been argued that the deterrence potential is curtailed under this system.[66] As such, caution is of essence in resorting to the ICC in transitions.

---

[57] For general readings on the International Military Tribunal at Nuremberg, see inter alia Eugene Davidson, *The Trials of the Germans: An Account of the Twenty-two Defendants Before the International Military Tribunal at Nuremberg* (University of Missouri Press 1966); George A Finch, 'The Nuremberg Trial and International Law' (1947) 41(1) *The AJIL* 20; Quincy Wright, 'The Law of the Nuremberg Trial' (1947) 41(1) *AJIL* 38; Christian Tomuschat, 'International criminal prosecution: The precedent of Nuremberg confirmed' (1994) 5(2-3) *Criminal Law Forum* 237

[58] Teitel, 'Transitional Justice Genealogy', 70, 72 et seq

[59] William A. Shabas, 'Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights', (2011) 9 *JICJ,* 609

[60] Teitel, 'Transitional justice genealogy', 73

[61] Inter alia, Donald L Hafner and Elizabeth BL King, 'Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Can and Should Work Together' (2007) 30 *BC Intl & Comp L Rev* 91; Rosanna Lipscomb, 'Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan' (2006) 106 *Columbia Law Review* 182; Ambos, *The legal framework of transitional justice*, 52 et seq

[62] For example: Kurt Mills, 'Bashir is Dividing Us: Africa and the International Criminal Court' (2012) 34(2) *HRQ* 404; Catherine Gegout, 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace' (2013) 34(5) *Third World Quarterly* 800; James A Goldston, 'More Candour about Criteria The Exercise of Discretion by the Prosecutor of the International Criminal Court' (2010) 8(2) *JICJ* 383

[63] Joint reading of Art 13(b) Rome Statute of the International Criminal Court (1998) A/CONF.183/9 and Charter of the United Nations, (1945), Chapter VII 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression'

[64] Darfur: UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593; Libya: UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970

[65] For a discussion on UNSC referrals to the ICC, see inter alia: Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7(2) *JICJ* 333; Luigi Condorelli and Annalisa Ciampi 'Comments on the Security Council Referral of the Situation in Darfur to the ICC' (2005) 3(3) *JICJ* 590; Dapo Akande, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 10(2) *JICJ* 299; Carsten Stahn, 'Libya, the International Criminal Court and Complementarity A Test for 'Shared Responsibility'' (2012) 10(2) *JICJ* 325

[66] Kate Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7 *IJTJ* 434

The requirements of TJ have tested the flexibility of ICL. Teitel identifies the 'rule of law dilemma' as one of the core features of transitional justice, questioning whether in transitions 'criminal justice [is] compatible with the rule of law'.[67] She notes how 'in fledgling democracies, where the administration of punishment can pose acute rule-of-law dilemmas, the contradictions to the uses of the law may become too great', attested by frequent decisions to avoid prosecutions.[68] One attempt to solve this dilemma distinguishes between positivist and natural law approaches described in the jurisprudential debate between Fuller and Hart; in essence, while positivists attach special value to procedural regularity (even in radical breaks with the past), natural lawyers focus instead on elements of substantive justice.[69] The second group favours the 'transformative role of law', discarding previous 'putative law' that 'lacked morality and hence did not constitute a valid legal regime'.[70]

The presumption of a relationship between internal morality (i.e. procedural rules) of a discipline and moral principles understood in a given social context has been deconstructed by Ronald Dworkin.[71] Before him, Schmitt posited that legitimacy outweighs legality, justifying exceptional violations of rules.[72] More closely related to transitional justice, Hannah Arendt has also addressed the tension between law and morality in her analysis of the Eichmann trial, in which she reaffirmed the supremacy of morality.[73] She did, however, identify a violation of international law and the territorial principle in the specific circumstances of the case (kidnapping and extradition to bring the indictee to justice in Jerusalem); but this act was condoned because the 'unsatisfactory condition of international law' meant that 'the realm of legality offered no alternative to kidnaping' , and ultimately justice is the only 'end of the law'.[74] Thus, achieving justice by upholding morality over legality intertwines positivist and natural law arguments to serve transitional aims.

As 'the principle of legality is a manifestation of the broader notion of the rule of law',[75] its implementation is likely to have an impact on a broad range of policy areas regulated by the state. The principle of legality (non-retroactivity) and the rule of law are conceptually separate, the latter being broader in political scope and less technically specific to criminal justice. It helps inform instrumental and substantive aspects of the rule of law in transition and non-transition alike. The instrumental approach focuses on the necessity of the legal system to 'work to structure behaviour' (i.e. to achieve the government's aims), whereas the substantive approach relies on the desirable objectives of 'fairness, human dignity, freedom and democracy' (i.e. the

---

[67] Teitel*, Transitional Justice,* 12 et seq

[68] Teitel, 'Transitional Justice Genealogy', 77

[69] Teitel*, Transitional Justice,* 14

[70] Ibid

[71] Notably, Ronald Dworkin, 'The Elusive Morality of Law' (1965) 10 *Vill L Rev* 631; R Dworkin, 'Philosophy, Morality, and Law: Observations Prompted by Professor Fuller's Novel Claim' (1965) *U Pa L Rev* 668

[72] See, inter alia, the discussion in David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (OUP 2012); Eric A Posner and Adrian Vermeule, 'Demystifying Schmitt' (2011) *Chicago Public Law and Legal Theory Working Paper* 333; Jef Huysmans, 'The Jargon of Exception: On Schmitt, Agamben and the Absence of Political Society' (2008) 2(2) *International Political Sociology* 165. For a critique to Schmitt's state of emergency exceptionalism, see inter alia David Dyzenhaus, 'Schmitt v. Dicey: Are states of emergency inside or outside the legal order' (2006) 27 *Cardozo L Rev* 2005

[73] Hannah Arendt, *Eichmann in Jerusalem* (Penguin 1963)

[74] Ibid, Epilogue

[75] Kenneth Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2009), 15, as discussed in Mark Drumbl, 'Book Review: Kenneth Gallant, The Principle of Legality in International and Comparative Criminal Law, CUP 2009', (2009) 31 *HRQ* 801

'goals of the social contract: liberty and justice').[76] Margaret Radin argues that 'rules are not made merely by legislatures or other authoritative entities', but are instead made 'public wherever strong social agreement exists in practice' and 'include an evolving complex of political commitments to the flourishing of the community and the individuals in it'.[77] This reflects Wittgenstein's social practice conception of rules, 'in which agreement in responsive action is the primary mark of the existence of a rule'.[78] This analysis also informs the rule of law dilemma in transitions.

3.1 The Malleability of the Rule of Law, ICL and Transitional Justice

The political context of transitional justice may affect the principle of legality. In general, this is expressed by the maxim *nullum crimen nulla poena sine lege* banning retroactive applications of criminal law.[79] Its interpretation in international criminal justice, however, has been ambiguous since the post-Second World War International Military Tribunal (IMT) at Nuremberg.[80] The principal preoccupation was the identification of an existing rule in international law that outlined the categories of war crimes and crimes against humanity; the alternative was to produce a carefully constructed argument to support the moral standing and justification of the IMT. Even Kelsen took this latter perspective and revived morality in PIL:

> To punish those who were morally responsible for the international crime of the Second World War may certainly be considered more important than to comply with the rather relative rule against ex post facto laws, open to so many exceptions.[81]

Contemporary scholars have argued that the Hague Conventions provided some precedent for war crimes, but not for crimes against humanity, for which the IMT 'had no real authority, nor did it even try seriously to demonstrate that such acts had been punishable under international law in the past'.[82] Quoting from the Nuremberg judgment, Schabas reports:

> the maxim nullum crimen sine lege is not a limitation of sovereignty, but is in general a principle of justice. (…) [The Nazi leaders] must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression.[83]

---

[76] Margaret Jane Radin, 'Reconsidering the Rule of Law' (1989) 69 *Boston University L Rev*, 781, 791 et seq. The main works referred to in her analysis of the two approaches (instrumental and substantive) are: Lon Fuller, *The Morality of Law* (Yale University Press 1964); and John Rawls, *A Theory of Justice* (Harvard University Press 1971)

[77] Ibid, 815, 819

[78] Ibid 798, citing Wittgenstein, *Philosophical Investigations* (3rd edition, Blackwell 1968)

[79] This principle is crystallised in numerous international law instruments, inter alia: ICL: Articles 22(1), 23, 24 *Rome Statute of the International Criminal Court* (1998). IHRL: Art. 11 *Universal Declaration of Human Rights* (1948); Article 15(1) *International Covenant on Civil and Political Rights* (1966); Article 7(1) *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950); Article 7(2) *African Charter on Human and Peoples' Rights* (1981); IHL: Article 67 *IV Geneva Convention* (1949); Article 75(4)(c) *Additional Protocol I to the Geneva Conventions* (1977); The principle of legality also constitutes a customary rule under IHL, identified by the ICRC as customary law (Customary IHL Rule 101) applicable to international and non-international armed conflicts and recognised in most national laws and military manuals (http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule101, [accessed 7 January 2013]

[80] Inter alia, Hans Kelsen, 'Will the judgment in the Nuremberg trial constitute a precedent in international law' (1947) 1 *Intl LQ* 153; Quincy Wright, 'The Law of the Nuremberg Trial' (1947) *AJIL* 38; George A. Finch, 'The Nuremberg Trial and International Law' (1947) 41 *AJIL* 20

[81] Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent', 165.

[82] Schabas, 'Synergy or Fragmentation?', 613 et seq

[83] Ibid quoting *Judgment of the Nuremberg International Military Tribunal* 1946

This argument is based on the presumed morality of international law in rejecting 'designs of invasion and aggression'; thus, the IMT favoured the legitimacy of the intent of seeing justice done rather than upholding the strict legality and the formalisms of non-retroactivity. The resulting principles of international law, including clearer formulations of the categories of war crimes and crimes against humanity, were subsequently endorsed by the UN International Law Commission,[84] paving the way for subsequent directions of ICL and IHRL. Nevertheless, the legitimacy of the ends pursued justified, but did not completely solve, the defects in formal legality accepted by the IMT.

More recent examples in ICL suggest that exceptions to strict applications of the principle of legality did not end at Nuremberg. In the *Tadić* case,[85] the ICTY severed the link between crimes against humanity and international armed conflict, which was clearly set out in its own Statute.[86] The Appeals Chamber got round the problem by stating that 'the requirement of a connection with war was 'peculiar to the context of the Nuremberg Tribunal', citing a 1948 decision of an American Military Tribunal as evidence that no nexus was required by customary international law'.[87] Today, this position is found in Article 7 of the Rome Statute, which does not even mention international armed conflict.[88] Arguments of peculiarity and exceptionalism have determined derogations from the principle of legality when judges (or political forces behind them) have deemed it necessary to revise the limits of applicable law, often paving the way for the formalisation of new norms. Although this may improve effectiveness of ICL, blatant derogations from the principle of legality forces any deviation to be fully supported by a strong motivation in the overall interest of 'justice' (as was the case in *Tadić*) – in other words, a legitimacy or morality argument.

The natural law/positivism dichotomy[89] still guides the philosophical underpinnings of the principle of legality in international criminal justice and more broadly international law today, and is also relevant for transitional justice. According to Teitel, the law in times of transition is uniquely flexible.[90] Conversely, Posner and Vermeule have argued there is legal continuity in transitional justice;[91] any partial derogations to strict applications of the principle of legality simply reflect natural evolutions of law even in times of non-transition. Thus, the concept and applications of law in times of transition stem from the law as a whole – and its embedded degree of flexibility – without having to radically erode legality.

---

[84] See, notably: UN International Law Commission, Nuremberg Principles, published in *Report of the International Law Commission Covering its Second Session, 5 June-29 Duly 1950*, Document A/1316, 11-14

[85] ICTY, *Tadić* (IT-94-1) all relevant documents available at http://www.icty.org/case/tadic/4 [accessed 12 May 2013]

[86] Reported in Schabas, 'Synergy or Fragmentation?'; a comprehensive analysis of the case is offered by Christopher Greenwood, 'International Humanitarian Law and the Tadic Case' (1996) 7 *EJIL* 265

[87] Schabas, 'Synergy or Fragmentation?', 617

[88] Ibid, also noting that ECHR judgments dealing with crimes agains humanity omit references to war. For a more detailed analysis, see Eva Brems, 'Transitional Justice in the Case Law of the European Court of Human Rights' (2011) 5 *IJTJ* 282, 298 et seq

[89] On positivism see, inter alia, Hans J Morgenthau, 'Positivism, functionalism, and international law' (1940) 34 *AJIL* 260; Benedict Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law' (2002) 13(2) *EJIL* 401; and on natural law, Stephen Hall, 'The persistent spectre: natural law, international order and the limits of legal positivism' (2001) 12(2) *EJIL* 269

[90] Teitel, *Transitional Justice*, 11-26

[91] Posner and Vermeule, 'Transitional Justice as Ordinary Justice', 761

Posner and Vermeule discuss various ways in which the rule of law can be understood in relation to TJ.[92] They identify four categories of applicable law: (1) new law, applied retroactively; (2) old law, which was never enforced; (3) old law, which was not enforced against the perpetrators from the old regime; and (4) international law.[93] The last three types find their sources in pre-existing normative frameworks (domestic or international), thus not raising rule of law concerns, provided the formal procedures for adoption under the laws existing at the time were satisfied. In that regard, the potential instrumentalism of blending all law together in transitional justice and tailoring legal solutions to the context (and people) of a given situation remains problematic. A defence could be provided by the New Haven School adage: 'jurisprudence is a theory about making social choices'.[94] As such, the rules themselves are informed by the process of making and applying laws, 'in ways that maintain community order and, simultaneously, achieve the best possible approximation of the community's social goals' (in this case, the aims of transitional justice).[95]

Similar considerations apply to the final category of law listed above: new law applied retroactively.[96] Posner and Vermeule argue that the rule of law dilemma can be circumvented through various techniques which place retroactive law within an existing legal framework, appealing to higher pre-existing law, such as constitutional law, international law, *jus cogens,* or (unenforced) norms of the previous regime.[97] Interpretative statutes also give new meaning to the previous regime's positive law, and modified statutes of limitations may extend the temporal reach of transitional justice.[98] These methods used to anchor transitional justice law, including substantially new norms and retroactive applications, to existing, ordinary (non-transitional) law, reveal positivist appropriations of essentially natural law claims.

Arguing that transitional justice constitutes an extraordinary form of justice, David Gray sees transitional laws as departing from the preceding legal order, which emanated from the 'abusive public face of the law': this determines the paradox of the rule of law.[99] He reports that some courts may uphold 'the principles of predictability' of non-retroactivity over 'the revolutionary role of law as an agent of change', whereas others favour the 'transformative potential of the law over its formal duties of predictability and fair warning'.[100] As such, notions of higher law surface again, giving voice to natural law theories that underpin transitional justice and somehow coexist with positivist requirements of law. In effect, strict positivist approaches may

---

[92] Ibid, 762

[93] Ibid, 767

[94] W Michael Reisman, 'The View from the New Haven School of International Law' (1992) 86 *Am Socy Intl L Proc* 118, 120

[95] Ibid. Another defence could be found in the economic analysis of international law approach, presupposing that states have preferences that serve their own welfare and interests (and of their citizens) instead of global interests, which instead produce inefficiency – see Eric A Posner and Alan O Sykes, *Economic foundations of international law* (Harvard University Press 2013), 12 et seq

[96] Posner and Vermeule, 'Transitional Justice as Ordinary Justice' 791 et seq

[97] Ibid,793 et seq

[98] Ibid, 795

[99] David Gray, 'What's so special about transitional justice? Prolegomenon for an excuse-centred approach to transitional justice' in (2006) 100 *Proceedings of the annual meeting* (American Society of International Law) 147; D Gray, 'An Excuse-Centered Approach to Transitional Justice' (2005-2006) 74 *Fordham Law Rev* 2621

[100] Gray, 'An Excuse-Centered Approach to Transitional Justice', 2636 et seq. The author discusses a case at the Constitutional Court of Hungary for the 'review of a law allowing prosecutions for those responsible for the suppression of the 1956 uprising' – reported by Gray as Judgment of March 3, 1992, [Constitutional Court] MK. No. 11/1992 (Hung.), and the so-called German Border Guards Case – reported by Gray as Berlin State Court, No. (523) 2 Js 48/90 (9/91).

require '*too much* legality', with the detrimental effect of 'undermin[ing] the legitimacy of law' and 'conflict[ing] with seemingly self-evident natural law aspirations' in punishing perpetrators or seeking redress for victims.[101] Reflecting the legitimacy-legality tension, Mark Drumbl suggests that 'law as *technique* may fall short of law as justice', suggesting a distinction between 'mass atrocity crimes' and 'ordinary common crimes' in light of the '*sui generis* nature' of the crimes proscribed by ICL.[102]

Self-styled 'third way' interpretations of the extraordinary/ordinary justice debate suggest that 'transitional justice is neither in itself a distinctive form of justice nor a mere compromise, but rather a principled application of justice in distinct circumstances' as proposed by De Greiff.[103] This argument still rests on potentially very differing conceptions of what the law of transitional justice could be, how it is derived from existing notions of justice, and how it ought to operate in practice. Therefore, when the law of transitional justice is conceived as a novelty, it is more likely to conflict with the principle of legality; whereas, when it is presented as flowing uninterruptedly from pre-existing norms, alterations to the principle of legality will be less likely.

Ultimately, however, political decisions determine whether the principle of legality can be usurped, as well as the extent to which the rule of law may be disregarded when new laws are introduced as part of TJ – as demonstrated at Nuremberg. From a theoretical angle, the New Haven School perspectives help defend the inherent flexibility required by transitional justice both with regard to processes and functions,[104] as well as with reference to the pluralism embedded in international lawmaking.[105] Additionally, critical legal studies approaches shed light on the power imbalances (including gender and socio-economic status) that affect TJ processes, which rely heavily on derogations to the principle of legality.[106] With an eye to the aims of transitional justice, a degree of flexibility motivated by specific circumstances and situated within the scope of applicable international law (and specifically ICL) is not necessarily detrimental to the legitimacy of the process. Moreover, a uniform global law of transitional justice is unlikely to yield better results than a conscientious application of the international legal framework integrated by domestic laws and relevant normative principles of informal justice (religious, traditional, etc), as discussed later in this thesis.

To sum up, the relationship between transitional justice and ICL is both historical and conceptual, as demonstrated by the solutions proposed to the rule of law dilemma from Nuremberg to the current steady-state TJ. At international level, trials at Nuremberg and at the ICTY provide examples of the creative solutions to reinterpret the laws of transitional justice to suit the needs of a given context. As to the question whether transitional justice is ordinary or extraordinary justice, Posner and Vermeule, Gray and Teitel have resuscitated older arguments over positivist and natural law approaches to criminal justice and international law, as well as the possible tension between legality and legitimacy in law. Acknowledging that transitional

---

[101] Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 15, discussed in Drumbl, 'Book Review', 804 et seq

[102] Ibid

[103] De Greiff, 'Theorizing transitional justice', 59

[104] Reisman, 'The View from the New Haven School'

[105] See for instance the arguments in Janet K Levit, 'Bottom-up International Lawmaking: Reflections on the New Haven School of International Law' (2007) 32 *Yale J Intl L* 393

[106] For a summary, see Nigel Purvis, 'Critical legal studies in public international law' (1991) 32 *Harv Intl LJ* 81

justice is ultimately guided by political factors that affect the interpretation and applications of ICL does not quite solve this debate, but it does place it in a broader context. Moreover, the gradual ascent of IHRL in relation to transitional justice shifts our attention away from the perpetrators and towards the victims and societies at large, overshadowing the role of ICL in transition in favour of a human-rights approach to transitional justice.

4. Transitional Justice and International Human Rights Law

The intimate link between transitional justice and IHRL is widely recognised. In the seminal 1995 *Transitional Justice* trilogy, edited by Neil Kritz, frequent references to human rights cement its importance in the discussion.[107] At UN level, the Office of the High Commissioner for Human Rights (OHCHR) coordinates transitional justice matters in relation to human rights – albeit presented as special issues.[108] The Human Rights Council has specifically requested the OHCHR 'to continue to enhance its leading role, including with regard to conceptual and analytical work regarding transitional justice, and to assist States to design, establish and implement *transitional justice mechanisms from a human rights perspective* [*emphasis added*]'.[109] The High Commissioner for Human Rights[110] has stated that the UN deals with TJ in close connection to IHRL practice.[111] And Secretary General followed this approach in his 2010 *Guidance Note on Transitional Justice*.[112] Human rights now dominate international conceptions of transitional justice.

This evolving connection between TJ and IHRL raises the question of whether transitional justice is 'simply part of the human rights movement'.[113] Paige Arthur discusses the cross-fertilisation between the two disciplines to illustrate how transitional justice is distinct from human rights, concluding that the historical origins of the former differentiates it from the latter[114] A further argument supporting separation emerges from an analysis of objectives: for transitional justice, the key aim is to facilitate a systemic transition to democracy (which generally include human rights provisions), and not the enjoyment of human rights specifically.[115] Moreover:

> Unlike the broader human rights movement, transitional justice relies on two sorts of beliefs, which are "normative ideas that specify criteria for distinguishing right from wrong and just from unjust"; and casual beliefs, which are "beliefs about cause-effect relationships which derive authority from the shared consensus of recognised elites".[116]

The relationship between law and politics further illustrates the distinction between transitional justice and IHRL.[117] This becomes visible, according to Sweeney, in the tension between the political purposes of TJ and human rights law.[118] In the context of the ECHR, that Court has upheld human rights standards set out in

---

[107] Kritz (ed) *Transitional Justice*

[108] See A/61/636-S/2006/980 and HRC Res 9/10 of 24/9/2008 in General Assembly, Human Rights Council, *Annual Report of the United Nations high Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Analytical study on human rights and transitional justice* (6 August 2009) (A/HRC/12/18).

[109] HRC Res 9/10

[110] Louise Arbour, 'Economic and social justice for societies in transition' (2007-2008) 40 *NYU J Intl L & Pol* 1

[111] Dialogue with Member States on rule of law at the international level organized by the Rule of Law Unit: 'UN Approach to Transitional Justice' (Address by Navanethem Pillay, UN High Commissioner for Human Rights), 2nd December 2009, available at http://www.unrol.org/doc.aspx?d=2916 [accessed 10th January 2011]. The UNHCHR stated: 'In the last three decades, transitional justice has become a prominent and well-established feature of human rights law and practice'

[112] United Nations, *Guidance Note of the Secretary General: UN Approach to Transitional Justice* (March 2010)

[113] Arthur, 'How "Transitions" Reshaped Human Rights', 358

[114] Ibid

[115] Ibid

[116] Ibid, quoting Judith Goldstein and Robert Keohane, 'Ideas and Foreign Policy: An Analytical Framework' in Judith Goldstein and Robert O. Keohane (eds) *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Cornell University Press, 1993) 9

[117] Sweeney, *The ECHR in the Post-Cold War Era*, 25 et seq

[118] Ibid, 27, listing contradictions between successor trials and the principle of non-retroactivity, restitutions and peaceful enjoyment of property, lustration and the right to family and private life

the Convention and case law, instead of allowing derogations motivated by the exceptions of transitions of states emerging from authoritarianism or civil war.[119] As transitional aims do not automatically trump IHRL, this divergence reveals that TJ is distinct from human rights.

In general, there is some evidence that transitional justice initiatives improve human rights and democratisation of a society.[120] Teitel highlights the role of human rights during the second phase of transitional justice, exemplified in post-authoritarianism in Latin America.[121] With regards to current steady-state transitional justice (discussed above), she laments the conflation between IHL, ICL and IHRL as a detriment to human rights, which still remain a benchmark of the process.[122] Compared to ICL, IHRL encompasses a broader range of situations within the scope of TJ, beyond the four crimes listed in the Rome Statute. Moreover, the category of victims in IHRL is wider than its equivalent in ICL: although the ICC has leapt forward in terms of victims' participation and reparations,[123] the remedies and reparations afforded in IHRL are, at least nominally, greater.[124] The main reason behind this discrepancy can be found in the subject-matter of the two: since the establishment of the ICC, ICL focuses on four international crimes, whereas the variety of human rights protected in a (growing) number of international instruments enjoy a capillary reach, which is more likely to respond to TJ needs.

A dual human rights approach to transitional justice can be identified: on the one hand, human rights violations may trigger transitional justice responses, while on the other, transitional justice seeks – more or less openly – to rebuild a fragmented society on human rights principles, including political and civil rights as well as economic, social and cultural rights. Human rights, at least theoretically, provide a framework for inclusivity and non-discrimination in dealing with the past and building a better future on the basis of basic freedoms and access to resources. Maintaining a human rights focus in transitional justice may also help mitigate the detrimental effects of power structures or exalting certain narratives over others,[125] as well as limiting the (continued) marginalisation of significant portions of society, like women and girls.[126]

---

[119] Ibid, 28 et seq

[120] Tricia D Olsen, Leigh A Payne, and Andrew G Reiter. 'The justice balance: When transitional justice improves human rights and democracy' (2010) 32(4) *HRQ* 980; Hunjoon Kim and Kathryn Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries' (2010) 54(4) *International Studies Quarterly* 939; Oskar NT Thoms, James Ron, and Roland Paris 'State-level effects of transitional justice: What do we know?' (2010) 4(3) *IJTJ* 329; Tricia D Olsen, et al 'When truth commissions improve human rights' (2010) 4(3) *IJTJ* 457

[121] Teitel, 'Transitional Justice Genealogy', 81

[122] Ibid, 91-92

[123] See for instance ICC, *Booklet: Victims before the International Criminal Court, A Guide for the Participation of Victims in the Proceedings of the Court*, available at http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf [accessed 12 January 2015]. For an analysis of reparations at the ICC, see, inter alia, Conor McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory' (2009) 3 *IJTJ* 250. On the potential and limitations of the ICC in relation to victim participation and restorative justice, see, inter alia, Mariana Pena and Gaelle Carayon, 'Is the ICC Making the Most of Victim Participation?' (2013) 7 *IJTJ* 518

[124] See for instance UN-OHCHR, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx [accessed 12 January 2015].

[125] Leebaw, 'The irreconcilable goals of transitional justice', 118

[126] Sources on gender and TJ include: Christine Bell and Catherine O'Rourke, 'Does feminism need a theory of transitional justice? An introductory essay' (2007) 1(1) *IJTJ* 23; Fionnuala Ní Aoláin, 'Women, security, and the patriarchy of internationalized transitional justice' (2009) 31(4) *HRQ* 1055; Brandon Hamber, 'Masculinity and transitional justice: an exploratory essay' (2007) 1(3) *IJTJ* 375

The human rights approach to transitional justice may also draw on cultural relativism debates to ensure TJ is responsive to local, informal and customary norms. Indeed, understanding the challenges and opportunities of culturally-responsive TJ is key to designing (participatory) processes that suit the needs of a beneficiary community.[127] Awareness of informal normative sources (such as traditional or religious norms) is, arguably, crucial for developing human rights-oriented TJ mechanisms that resonate with the victims' visions of justice, which may in turn increase their involvement in transitional processes. The second half of this thesis will explore these themes with particular reference to Muslim-majority settings.

Finally, it is important to recall that the presumption of the global bounty of human rights is debatable,[128] as is the usefulness of IHRL instruments.[129] Some have explained how human rights are bad for resolving conflict.[130] Others have argued that promoting human rights can be 'bad politics' if it legitimises repressive states or facilitates the harm it seeks to prevent.[131] Cases radically against human rights have been made: for example, the notion of human rights has been described as 'fraudulent';[132] and Posner has recently argued that 'Human rights treaties were not so much an act of idealism as an act of hubris', with deep-rooted colonial connotations.[133]

To reply to these critiques, human rights approaches to transitional justice do not have to be necessarily rigid and imperialistic: in principle, transitional justice allows for flexible approaches to human rights that respond to the needs of beneficiary societies and the sentiment of political actors. Ultimately, the way transitional justice is designed is a policy choice: there are no *a priori* human rights imperatives in transitions, and criticism directed at IHRL in that regard expresses frustration more than anything. The choice to uphold strict interpretations of IHRL is an obligation for UN-led transitional justice initiatives, but individual countries may freely choose differently within their own jurisdiction, according to their past and present status of ratification and practice.[134]

4.1 Root Causes, Human Development, Peace and Transitional Justice

IHRL, encompassing in principle the full range of rights, is better suited than ICL to addressing the root causes of conflict preceding transitional justice.[135] The 2010 *UN Guidance Note* calls for transitional justice to take into account 'the root causes of the conflict and the related violations of all rights, including civil,

---

[127] L Viaene and E Brems, 'Transitional justice and cultural contexts: learning from the Universality debate', (2010) 28(2) *NQHR* 199

[128] On the critique of human rights, inter alia: Michael Ignatieff, *Human rights as politics and idolatry* (Princeton University Press 2001); Costas Douzinas, *Human rights and empire: the political philosophy of cosmopolitanism* (Routledge 2007); An-Na'im, Abdullahi Ahmed (ed) *Human rights in cross-cultural perspectives: A quest for consensus* (University of Pennsylvania Press 1995)

[129] Oona A Hathaway, 'Do human rights treaties make a difference?' (2002) *Yale Law Journal* 1935

[130] Ram Manikkalingam, 'Promoting peace and protecting rights: how are human rights good and bad for resolving conflict?' (2008) 5(1) *Essex Human Rights Review* 1

[131] David Kennedy, 'International Human Rights Movement: Part of the Problem?' (2002) 15 *Harv Hum Rts J* 101, 123 et seq

[132] John O Nelson, 'Against human rights' (1990) 65 *Philosophy* 341

[133] Eric Posner, 'The case against human rights', *The Guardian* 4 December 2014, available at http://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights [accessed 10 January 2015].

[134] See for example the Supreme Iraqi Criminal Tribunal's judgments, discussed in Michael A Newton, 'The Iraqi High Criminal Court: controversy and contributions' (2006) 88(862) *IRRC* 399

[135] On this see, inter alia: Lisa J Laplante, 'Transitional justice and peace building: Diagnosing and addressing the socioeconomic roots of violence through a human rights framework' (2008) 2(3) *IJTJ* 331

political, economic, social and cultural rights'.[136] This acknowledges links between TJ and broader questions of sustainable peace[137] and development[138] stemming from political and armed violence as well as socio-economic inequalities. Addressing socio-economic rights as part of transitional justice, argues Ismael Muvingi, is necessary to prevent the recurrence of conflict; at the same time, it is important to ensure that TJ mechanisms do not reproduce past inequalities through a mix of neoliberalism, colonialism, post-colonialism and globalisation.[139] But linking the ultimate aims of transitional justice initiatives to long-term peace and development carries a double warning: firstly, the promise of security and material wellbeing is unlikely to be honoured by transitional justice mechanisms alone; secondly, focusing excessively on long-term social reconciliation may cause additional grievances in the present, further exacerbating social tensions.

During her mandate as UN High Commissioner for Human Rights, Louise Arbour made a strong case for the inclusion of economic, social and cultural rights (ESCR) as an integral part of transitional justice.[140] The holistic interpretation of transitional justice that Arbour borrows from Alexander Boraine, founder of the *International Center for Transitional Justice*, 'offers a deeper, richer and broader vision of justice' that takes into account the three key stakeholders of the process: victims, perpetrators and society at large.[141] In essence, victims need to survive and, probably, their living conditions might need to be bettered; structural inequalities that allowed for perpetrators to inflict harm need redress; and societies in general might need restructuring so as to limit patterns of prevarication, marginalisation and suffering. But can transitional justice help with this? Lars Waldorf has argued that transitional justice in its current form is unable to respond to ESCR considerations – and extensions of its reach in that direction may be impractical.[142] Aoife Nolan and Evelyne Schmid, instead, have responded to these concerns, suggesting that ESCR are, in fact, as aspirational in transitional justice as civil and political rights are.[143]

ESCR approaches to transitional justice may help respond to violations that affect entire communities, including mass famine,[144] lack of access to healthcare,[145] settler-colonial harms harms inflicted to indigenous

---

[136] *UN Approach to Transitional Justice* (March 2010), 3

[137] Inter alia, Sriram, 'Justice as peace?'; Laplante, 'Transitional justice and peace building'

[138] On the theme of transitional justice and development, see inter alia, Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (Social Science Research Council and International Center for Transitional Justice 2009); Rama Mani, 'Dilemmas of expanding transitional justice, or forging the nexus between transitional justice and development' (2008) 2(3) *IJTJ* 253; Roger Duthie, 'Toward a development-sensitive approach to transitional justice' (2008) 2(3) *IJTJ* 292; Chris Huggins, 'Linking broad constellations of ideas: Transitional justice, land tenure reform, and development' in de Greiff and Duthie, *Transitional Justice and Development,* 332. For an overview of economic questions and TJ, see inter alia, Zinaida Miller, 'Effects of Invisibility: In Search of the 'Economic' in Transitional Justice' (2008) 2 *IJTJ* 266

[139] Ismael Muvingi, 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies" (2009) 3 *IJTJ* 163, 167, 178

[140] Arbour, 'Economic and social justice for societies in transition', 20

[141] Ibid, 2, quoting Alexander Boraine, 'Transitional Justice: a Holistic Interpretation', (2006) 60 *Journal of International Affairs* 17, 18

[142] Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' (2012) 21(2) *Social and Legal Studies* 171

[143] Evelyne Schmid and Aoife Nolan, ''Do No Harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice' (2014) 8 *IJTJ* 362

[144] For example Randle C DeFalco, 'Accounting for Famine at the Extraordinary Chambers in the Courts of Cambodia: The Crimes against Humanity of Extermination, Inhumane Acts and Persecution' (2011) 5 *IJTJ* 142

[145] B Harris et al 'Bringing Justice to Unacceptable Health Care Services? Street-Level Reflections from Urban South Africa' (2014) 8 *IJTJ* 141, 160

peoples,[146] and unequal land distribution.[147] Denial of food, healthcare and structural social marginalisation all fall within the scope of 'subsistence harms', proposed by Diana Sankey as a novel category of 'interrelated mental, physical and social elements' of the minimal 'conditions necessary for people to survive and live' which require recognition in transitional justice.[148] This approach responds to the needs of victims, who are seen as survivors whose lives depend on the implementation of basic ESCR, and not (only) on transitional justice instruments that focus on civil and political rights.

ESCR-sensitive transitional justice also paves the way for an investigation into the economic crimes that affect a society facing transition, including corruption.[149] In establishing links between commercial loans and gross human rights violations, corporate accountability becomes relevant to transitional justice,[150] and upon further scrutiny, even corporate complicity.[151] International donors and International Financial Institutions (IFI) may contribute to propping up abusive governments – as was the case with Mubarak's regime in Egypt, as Reem Abou-El-Fadl notes.[152] Paradoxically, although IFIs are aware of the noxious effects of corruption, their intervention in fragile states may be detrimental.[153] Juan Pablo Bohoslavsky argues that 'lenders providing financial assistance to authoritarian regimes should be held responsible for complicity if they knew or should have known that they would facilitate human rights abuses', recalling that IFIs are 'under obligation not to violate or become complicit in the violation of general rules of human rights law' as well as *jus cogens*.[154] By way of example, he cites the 1960s controversy between the UN General Assembly and the World Bank over lending policies to South Africa and Portugal due to their human rights situation.[155] A further issue for transitional justice to consider is what to do with massive sovereign debt incurred by former authoritarian regimes to support a system of human rights violations;[156] a ESCR-sensitive approach may offer some solutions.

---

[146] For example in Australia, see inter alia J Balint, J Evans and N McMillan, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach' (2014) 8 *IJTJ* 194

[147] Chris Huggins, ICTJ Research Brief, *Linking Broad Constellations of Ideas: Transitional Justice, Land Tenure Reform, and Development* (July 2009)

[148] Diana Sankey, 'Towards Recognition of Subsistence Harms: Reassessing Approaches to Socioeconomic Forms of Violence in Transitional Justice' (2014) 8 *IJTJ* 121, 126

[149] Ruben Carranza, 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' (2008) 2 *IJTJ* 310

[150] Sabine Michalowski (ed), *Corporate Accountability in the Context of Transitional Justice* (Routledge 2013); and S Michalowski, 'No Complicity Liability for Funding Gross Human Rights Violations?' (2012) 30 *Berkeley J Intl Law* 451, 517 et seq

[151] Juan Pablo Bohoslavsky and Veerle Opgenhaffen, 'The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship' (2010) 23 *Harv Hum Rts J* 157; and Juan Pablo Bohoslavsky and Mariana Rulli, 'Corporate Complicity and Finance as a 'Killing Agent': The Relevance of the Chilean Case' (2010) 8 *JICJ* 829

[152] Reem Abou-El-Fadl, 'Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will', (2012) 6 *IJTJ* 318

[153] Carranza 'Plunder and Pain', 317 et seq

[154] Juan Pablo Bohoslavsky, 'Tracking Down the Missing Financial Link in Transitional Justice' (2012) 1 *International Human Rights Law Review* 54, 78

[155] Ibid citing S Bleicher, 'UN v IBRD: A Dilemma of Functionalism,' (1970) 24(1) *International Organization*, 31

[156] Sabine Michalowski and Juan Pablo Bohoslavsky "Ius Cogens, Transitional Justice and Other Trends of the Debate on Odious Debts: A Response to the World Bank Discussion Paper on Odious Debts' (2009-2010) 48 *Colum J Transnatl L* 59, 92 et seq. On transitional justice and odious debt see also David C Gray, 'Devilry, Complicity and Greed: Transitional Justice and Odious Debt', (2007) 70 *Law and Contemporary Problems* 137

Although in practice minimal evidence of the ESCR-sensitive approach to transitional justice is available,[157] the right to property is the exception to this rule. Considering the ICTY case of *Kupreskic,* Arbour recalls that the 'comprehensive destruction of homes and property may constitute the crime against humanity of persecution when committed with the requisite intent'.[158] This echoes the Geneva Conventions in which 'intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies, is also recognised as an international crime'.[159] The restitution of property, however, is more complex. In the context of decommunisation, the ECHR has favoured stability of property relations and the prospective rule of law rather than restitutions to original owners.[160] The Court found that 'long-extinguished' property right could not be revived' and thus property restitution was not due after the fall of communism.[161] All of this suggests that although a clear and uniform framework for property rights is still absent, unlike other ESCR issues it has been considered as part of TJ.

In essence, ensuring a dialogue between ESCR and transitional justice is part and parcel of the human rights approach to transitional justice, considering also the principle of the indivisibility of rights. However, the extent to which international law may yield tangible results in redressing violations of ESCR through TJ mechanisms is unclear. While rejecting the supremacy of civil and political rights on the basis of a presumption of more successful justiciability, ESCR has the potential of guiding transitional justice initiatives in light of the root causes of conflict and with an eye to human development (of which human security, broadly interpreted as a shorthand for peace, is an important structural condition). This approach also points to radical critiques of the role of IFIs and international donors in exacerbating violence, as well as the neoliberal agendas pushed onto fragile transitional states. By becoming more ESCR-sensitive, the human rights approach to transitional justice is more likely to respond to overarching collective issues that also contribute to the broad aims of accountability, justice and reconciliation – such as accountability for causing harm to societies (including subsistence harms), social justice with a view to a better future for all, and reconciliation between individuals and groups who must find strategies to live side by side after violence.

---

[157] Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 *IJTJ* 339, 345 et seq

[158] Arbour, 'Economic and social justice for societies in transition', 15. The case is: *Kupreskic*, Case No. IT-95-16-T, Trial Judgment, Jan 14, 2000.

[159] Ibid, 15. See Protocols Additional to the Geneva Conventions 1949, and Relating to the Protection of Victims of International Armed Conflict (Prot I) art. 54 para. 1, 1977; and Rome Statute of the ICC art 8 para. 2(b) (xxv)

[160] Tom Allen, 'Restitution and Transitional Justice in the European Court of Human Rights' (2006-2007) 13 *Colum J Eur L* 1

[161] Patrick Macklem, 'Rybná 9, Praha 1: Restitution and Memory in International Human Rights Law' (2005) 16 *EJIL* 1 citing the case of *Gratzinger*

5. Transitional Justice and International Humanitarian Law

Alongside IHRL and ICL, IHL provides an international 'normative framework and language for thinking about successor justice' and 'regime wrongdoing'.[162] Discussing the influence of IHL on transitional justice, Elizabeth Salmón identifies a connection 'between the way the parties act during an armed conflict' and 'the chances of achieving peace and reconciliation while restoring the rule of law once the hostilities have ended'.[163] This relationship emerges at two points in time: before the conflict, IHL carries a preventive role regarding state obligations to implement and give effect to its provisions nationally, to prevent 'serious violations of its provisions during a conflict'; after the conflict, its punitive provisions 'establish the obligation to suppress all violations of IHL and to search for and prosecute those who have committed grave breaches of IHL in international armed conflicts' – extending to non-international armed conflict through customary international law.[164]

The application of IHL is specific to armed conflict, limiting its usefulness to only transitions from recognised international or civil wars. In those cases, the jurisdiction of IHL overlaps with IHRL – which provides a normative continuum in war and peace.[165] Revising the *lex specialis* principle, both the ICJ and the UN Committee on Economic, Social and Cultural Rights have stated that they are equally applicable in conflict.[166] This means that even when IHL applies to TJ situations, it does not eclipse IHRL.

One of the main advantages of applying IHL in TJ contexts is the imposition of 'obligations on all parties to an armed conflict, including non-governmental armed groups', making authorities and non-state actors equally accountable for violations.[167] As such, categories protected under IHL – notably civilians and persons *hors de combat* – are considered to be vulnerable in conflict situations regardless of who commits violent acts against them. Extending the responsibility of violations to non-state actors, consequently, expands the contours of the victim group.

---

[162] Teitel, *Transitional Justice*, 35; citing Theodor Meron, *War Crimes Law Comes of Age: Essays* (Clarendon Press 1998). For an overview of IHL see, inter alia, Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Third Edition, OUP 2013); and Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (CUP 2010)

[163] Elizabeth Salmón, 'Reflections on international humanitarian law and transitional justice: lessons to be learnt from the Latin American experience' (2006) 88(862) *IRRC* 327

[164] Ibid, 328 et seq. She also notes that an indirect result of effective enforcement of IHL is reconciliation, as occurred in the truth commissions of El Salvador, Nicaragua, Peru, Guatemala and Colombia

[165] Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict'n(2007) 40 *Isr L Rev* 310. Also, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [8 July 1996] ICJ Rep 226, 25; for commentary, Dale Stephens, 'Human Rights and Armed Conflict-The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case' (2001) 4 *Yale Hum Rts & Dev LJ* 1

[166] Orna Ben-Naftali & Keren Michaeli, 'We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings' (2003-2004) 36 *Cornell Intl L J* 233, 275; discussing Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, 31 August, 2001, U.N. Doc. E/C.12/1/Add. 69 (Aug. 31, 2001), 11 and *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 240

[167] The International Committee of the Red Cross (ICRC), *Report: Strengthening legal protection for victims of armed conflicts*, Geneva, October 2011, 5

Under IHL, victims of international and non-international armed conflict are protected in Additional Protocols I and II.[168] The 2011 ICRC Report, *Strengthening legal protection for victims of armed conflicts*, expressly lists persons deprived of liberty (internees), victims of IHL violations, persons affected by the degradation and destruction of the natural environment, vulnerable to losing their livelihood, and internally displaced persons.[169] Nevertheless, as there is no 'general mechanism that would allow victims to assert their rights under IHL',[170] it is arguably more useful doctrinally to frame the gravity of certain types of violence than as a practicable tool for victims to seek redress.

Much of the harm suffered in conflict recognised under IHL may give rise to justiciable rights for victims under IHRL. Gross human right violations and breaches of IHL have been considered jointly to include within the category of victims those who 'individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss' and 'immediate family, dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation'.[171] Compared to IHL, in principle IHRL provides a more tangible means of redress as part of TJ, given the nominal existence of regional and international mechanisms designed for individual applications of victims of this sort of violence.

Since the establishment of the ICC, war crimes, crimes against humanity, genocide and aggression fall expressly within the scope of the Rome Statute.[172] Cassese has implied that the subject matter of IHL is subsumed under ICL.[173] Therefore, in the current steady-state transitional justice, grave violations of IHL would, *ratione materiae*, fall within the jurisdiction of the ICC. Prior to the establishment of the ICC, the ICTY also linked IHL and international criminal justice, in its notable decision to consider the quintessentially 'private' crime of rape as a war crime, the most serious IHL violation.[174] The case of *Kunarac* suggests that ICL can be a vehicle for the implementation and the development if IHL in relation to transitional justice; ICL may also be a means to bring to justice perpetrators of harm and provide some legal redress for victims of grave IHL breaches committed by authorities and non-state actors, in the absence of a designated IHL tribunal.

In addition to the difficulties of justiciability, drawing on IHL to 'incorporate a full account of successor justice' is challenging in itself.[175] Salmón considers whether, 'in the post-conflict period, the obligation to

---

[168] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

[169] ICRC, *Strengthening legal protection for victims of armed conflicts*

[170] Liesbeth Zegveld, 'Remedies for victims of violations of international humanitarian law' (2003) 85(851) *IRRC* 497, 500

[171] Principle 8 of the 2006 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* discussed in Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice* (Hart 2008), 23; M Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6(2) *Human Rights Law Review* 203

[172] Rome Statute of the ICC, articles 5-9.

[173] On this see, inter alia: Antonio Cassese, 'On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law' (1998) 9(1) *EJIL* 2

[174] See, notably, *Prosecutor v Kunarac, Kovac and Vukovic*, Case no IT-96-23T, Judgment 22 Feb 2001, discussed in Rosalind Dixon, 'Rape as a Crime in International Humanitarian Law: Where to from here?' (2002) 13(3) *EJIL* 697

[175] Teitel, *Transitional Justice*, 35

comply with the rules of IHL requiring perpetrators of violations to be punished' constitutes 'an obstacle to the transition process' – for instance, by limiting amnesties and reconciliation initiatives.[176] While political crimes and minor common crimes may fall within the scope of amnesties, grave breaches of IHL, including war crimes and torture, cannot be amnestied.[177] Truth commissions have also considered the 'punitive or sanctioning aspects of IHL' when a situation of armed conflict is ascertained.[178] This suggests that strict adherence to IHL may stand in the way of the transitional aim of reconciliation.

On the whole, the present role of IHL in transitional justice is interstitial to that of IHRL and ICL, largely due to the lack of justiciability of IHL. Moreover, compared to IHRL and ICL respectively, IHL is generally less responsive to the needs of individual victims, nor does it apportion individual criminal responsibilities on perpetrators. Nevertheless, IHL has helped transitional justice develop truth-seeking initiatives (especially in the Southern Cone) which has paved the way for the establishment of the right to the truth, discussed in chapter 3.

[176] Salmón, 'Reflections on IHL and transitional justice', 331, 337

[177] Ibid, 337 et seq

[178] Ibid, 350 et seq, 353, recalling TRCs in Chile, El Salvador, Guatemala and Peru

6. Bottom-up Norms of Transitional Justice

The international normative framework for transitional justice has been described as a 'mess' by Christine Bell.[179] This uncertainty, according to Moses Chrispus Okello, offers the 'potential for genuine transformation of the international balance of powers' promulgated by international law.[180] Relatedly, An-Na'im voices concern over neoliberal, 'North Atlantic' conceptions of human rights, hierarchies of needs and procedural mechanisms to redress past violations rejecting 'indigenous or 'traditional' practices' as 'inconsistent with 'universal' human rights norms'.[181] As such, the assumption that international law is the benchmark for TJ is problematic, unless it engages local norms and practices.

The UN report *The rule of law and transitional justice in conflict and post-conflict situations* states that international law can be accommodated by all legal systems and traditions.[182] Bell suggests that international law could offer 'a notion of best practice', to 'encourage people to comply through processes that include democratic dialogue on how international standards are best implemented in any one context'.[183] This approach seems to reconcile with the pluralistic legal framework of transitional justice, in which all relevant sources, including unofficial norms, are taken into account. Such flexibility allows us to move away from the legalism that comes with considering only formal written norms, which does not provide a complete picture of the various rules that guide TJ in a given setting.[184] Ultimately, the balance between global and local law is a contextual policy decision.

Discussing transitional justice in cultural contexts, Lieselotte Viaene and Eva Brems argue that 'cultural challenges are part of a critical evaluation' of the field, attested by a growing interest in 'bottom-up, interdisciplinary, empirical and concrete approaches'.[185] In effect, TJ initiatives that combine different types of formal as well as unofficial law (including informal, customary or religious normative principles) may help contextualise global norms in local language. Grassroots legitimacy may be bolstered by forms of 'bespoke' TJ, which incorporate local perspectives instead of universalist visions of justice.[186] Thus, if discrepancies between local and global can be reckoned with, international law and local understandings of justice may mutually reinforce TJ.

---

[179] C Bell, 'The "New Law" of Transitional Justice' in K Ambos et al (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Springer-Verlag 2009)

[180] Moses Chrispus Okello, 'Afterward: Elevating Transitional Local Justice or Crystallizing Global Governance?' in Rosalind Shaw and Lars Waldorf (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press 2010), 275

[181] Abdullahi Ahmed An-Na'im, 'Editorial Note: From the Neocolonial 'Transitional' to Indigenous Formations of Justice' (2013) 7 *IJTJ* 197

[182] UN Security Council, *The rule of law and transitional justice in conflict and post-conflict situations*, 5

[183] Bell, 'The "New Law" of Transitional Justice' 124

[184] On the limitations of legalism in TJ, see Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34(4) *J Law & Soc* 411

[185] Viaene and Brems, 'Transitional justice and cultural contexts', 211

[186] Jaya Ramji-Nogales, 'Designing Bespoke Transitional Justice: A Pluralist Process Approach' (2010) 32(1) *Michigan Journal of International Law* 1

The perspective of legal pluralism describes the relationship between coexisting – and sometimes competing – different legal orders within the same jurisdiction or (informal) normative space.[187] Today's 'global legal pluralism'[188] responds to the complexities of an interdependent world – the very context in which transitional justice develops through the initiative of a variety of actors and on the basis of competing norms. According to Brian Tamanaha, manifestations of legal pluralism include the inherently pluralistic notion of international law,[189] the challenge posed by human rights norms to state law, customs and cultural practices,[190] the self-creating legal orders established by 'transnational corporations, NGOs (…), trade associations, various subject-based international agencies, and lawyers who serve them', trans-governmental networks, and the global movements of people.[191] Understanding what exactly constitutes law might be complicated,[192] and these uncertainties affect the rule of law, especially in transitional contexts.[193] Laura Grenfell suggests that while the 'rule of law is deficient when there is confusion within communities as to the applicable law due to inconsistencies between local law and the formal legal system', legal pluralism is still very important in 'weak state legal systems'.[194] Indeed, the perspective of legal pluralism provides an analytical tool for understanding how competing rules operate in given transitional settings.

The TJ process in Rwanda offers examples of how the ICTR, domestic trials and local *gacaca* courts coexisted under legal pluralism.[195] In essence, alleged perpetrators fell within the jurisdiction of different fora according to their role and the gravity of their actions during the genocide. This structure, in principle, enabled complementarity of the different mechanisms.[196] So, masterminds ('persons responsible for genocide and other serious violations of international humanitarian law') fell under the jurisdiction of the ICTR, set up by a UN Security Council resolution under Chapter VII of the Charter, as the situation constituted 'a threat to

---

[187] For an overview on this topic, see, inter alia: S E Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review* 869; John Griffiths, 'What is legal pluralism?' (1986) 18(24) *The Journal of Legal Pluralism and Unofficial Law* 1; Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1991) 13 *Cardozo L Rev* 1443. The notion of normative space in relation to legal pluralism is discussed by Boaventura de Sousa Santos, 'Law: A map of misreading. Toward a Postmodern Conception of Law' (1987) 14 *JL & Socy* 279; more recently in Anne Griffiths, Franz von Benda-Beckmann, Keebet von Benda-Beckmann 'Space and legal pluralism: an introduction' in Anne Griffiths, Franz von Benda-Beckmann, Keebet von Benda-Beckmann (eds) *Spatializing Law: An Anthropological Geography of Law in Society* (Ashgate 2009), 1

[188] Paul Schiff Berman, 'Global Legal Pluralism' (2006–2007) *Southern California Law Review* 1155

[189] Brian Z Tamanaha, 'Understanding legal pluralism: past to present, local to global' (2008) 30 *Sydney L Rev* 375, 386 et seq, citing William W Burke-White, 'International Legal Pluralism' (2003-2004) 25 *Michigan J of Int'l L* 963 and Andreas Fischer-Lescano & Gunther Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2003-2004) 25 *Michigan J of Int'l L* 999

[190] Tamanaha, 'Understanding legal pluralism', citing Sally Engle Merry, 'Global Human Rights and Local Social Movements in a Legally Plural World' (1997) 12 *Canadian Journal of Law and Society* 247

[191] Ibid, 388

[192] Ibid, 392

[193] Laura Grenfell, 'Legal Pluralism and the Rule of Law in Timor Leste' (2006) 19 *Leiden J of Intl L* 305

[194] Ibid, 335

[195] For background on the ICTR see inter alia: Payam Akhavan 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' (1996) *AJIL* 501; William Schabas, *The UN international criminal tribunals: the former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006); at national level: Madeline H. Morris, 'The Trials of Concurrent Jurisdiction: The Case of Rwanda' (1996) 7 *Duke J Comp & Intl L* 349; and on the *gacaca*, Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers* (CUP 2010)

[196] Madalena Pampalk and Nandor Knust 'Transitional Justice und Positive Komplementarität', available at http://zis-online.com/dat/artikel/2010_11_502.pdf [accessed 15 April 2014]. Many of these themes were also discussed in a related conference paper: Nandor Knust, PMTJ - A Pluralistic Model of Transitional Justice, 2nd Symposium of the Young Penalist of the AIDP co-organized with the CEJEP "Transitional Justice", La Rochelle, 29 September 2011 (attended by the author)

international peace and security'.[197] Mid-ranking persons were tried in national Rwandan courts (though these trials have been strongly criticised for their bias).[198] The third tier of justice was formally devolved to the *gacaca*, a (reinterpretation of) community justice, considered by its proponents suitable for lower-level perpetrators who still lived in the communities they had harmed. The *gacaca* are 'based on indigenous models of local justice', involving, according to some estimates, up to one million individuals.[199] Though international reception of the *gacaca* has been mixed,[200] the Rwandan experience proves that multi-layered TJ drawing on local justice as well as on PIL is feasible – and legal pluralism can help analyse it.

The possibilities offered by legal pluralist perspectives on TJ and the inclusion of local justice are not without risks. A theoretical threat is posed by the relativist/universality debate which polarises competing norms on the basis of their presumed local or global foundations and hinders dialogue (discussed in chapter 4). Moreover, with specific reference to the notion of local justice, two distinctive challenges have been identified by Joanna Stevens and Lars Waldorf.[201] Firstly, by focusing on groups rather than individuals, local justice pursues collective benefits as opposed to individual ones, which is likely to result in the dominance of powerful actors' interests over those of disempowered survivors. For instance, focusing on violence between different groups may overshadow violence within a single group – notably gender-based violence (GBV) and violence against women and girls used as an internal mechanism of social control in addition to external uses of sexual violence as a weapon of war (a war crime).[202] And as women are often relegated 'to peripheral roles in traditional mechanisms of justice', GBV is likely to be trivialised.[203] Secondly, by seeking compromise and community harmony, local justice initiatives may treat certain forms of harm as unimportant in the bigger picture, such as minority rights of politically and socially marginalised groups.[204] Third, Stevens and Waldorf consider the emphasis on restitution over other forms of punishment in local justice, which may skew the focus of TJ on material rather than moral responsibility, or even ignore root causes of conflict and uneven power distribution.

The community focus of local and traditional forms of justice may actually reaffirm abusive power structures. Importing cultural contexts to TJ calls for a 'double caution' to 'avoid incorrect simplistic notions of culture or tradition' and identify the 'abuse of cultural arguments (…) by governments attempting to cover up their shortcomings in dealing with the past'.[205] Waldorf warns against a 'tendency to romanticize local

---

[197] UNSC Res 955 (8 November 1994) S/RES/955, preamble

[198] Alison des Forges and Timothy Longman, 'Legal responses to genocide in Rwanda' in Eric Stover & Harvey M. Weinstein (eds) *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (CUP 2004)

[199] William Schabas, 'Genocide trials and Gacaca courts' (2005) 3(4) *JICJ* 879

[200] Based on conversations with Phil Clark and Lars Waldorf at the 2013 *Law and Conflict at Durham* series, Durham University

[201] Lars Waldorf, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice' (2006) 79 *Temple Law Review* 1, 9 et seq, quoting Joanna Stevens, *Traditional and Informal Justice Systems in Africa, South Asia and the Caribbean* (Penal Reform International 1999) 5-7, 13

[202] On girl child soldiers and GBV within fighting groups, see Kirsten Fisher, *Transitional Justice for Child Soldiers: Accountability and Social Reconstruction in Post-Conflict Contexts* (Palgrave 2013), 170

[203] Ibid, discussing the Mato Oput traditional justice mechanisms in Uganda and the marginalisation of women.

[204] On the general topic of minority rights and transitional justice, see Chris Chapman, *Transitional Justice and the Rights of Minorities and Indigenous Peoples*, Research Brief (New York, International Center for Transitional Justice 2009)

[205] Viaene and Brems, 'Transitional justice and cultural contexts', 220

justice by downplaying its coercive aspects and its function in asserting (or reasserting) social control'.[206] Recalling Hobsbawm and Ranger's seminal work on *The Invention of Tradition,* 'what passes for harmonious, indigenous custom are more often than not 'invented traditions' designed to promote social control and political ideologies'; as such, only demystifying local justice facilitates an honest appraisal of its role in TJ.[207] Thus, the turn to local justice, a catch-all phrase including cultural, traditional and religious normative values of a community, may conceal the political motives and interests of powerful stakeholder of the TJ process.

6.1 Religious Norms, International Law and Transitional Justice

In light of legal pluralism and the need to engage local norms alongside PIL, religious normative values – the principles that underpin formal and informal 'religious law' – provide an additional layer to the applicable legal framework of TJ. When a society facing transition demonstrates strong religious sentiments – whether at individual or institutional level or both – religious law is likely to play a part in TJ alongside international law and other formal norms. In some cases, religious norms are formalised into positive official/state law, and as such may affect TJ processes through domestic law and the agency of recognised religious actors. Apart from their influence on state law, religious norms may express understandings of local justice, able to permeate TJ processes as 'intuitive unofficial law' (described below and in chapter 4). It also interacts with global law, to the extent faith-based normative values cross national boundaries.

The interface between religion and international law has been described as a 'double-edged sword', capable of both positive and negative uses.[208] Some have celebrated a tolerant 'universalising influence of religion', which marginalises regressive 'religious extremism based on an alleged dualism between good and evil'.[209] However, this form of 'humane internationalism' inspired by religion has been criticised as echoing the project of 'gentle civilisers' of the mid-nineteenth century and theories of Christian-driven PIL.[210] Given that international law is 'about how people negotiate power, justice, and pragmatic self-interest, at home and abroad',[211] religious law may serve to justify and contest power structures. Ultimately, religious laws are interpreted and enforced by living individuals and institutions in a political context.[212] Thus, it is imprudent to believe either that 'religion can play a positive and important normative role in international law and

---

[206] Waldorf, 'Mass Justice for Mass Atrocity', 10

[207] Ibid, 6, citing E Hobsbawm and T Ranger (eds), *The Invention of Tradition* (CUP 1983). See for instance on the *gacaca*, Clark, *The Gacaca Courts*, 47 et seq

[208] Mashood Baderin, 'Religion and International Law: Friends or Foes?' (2009) 5 *European Human Rights Law Review* 637, 649 citing Carolyne Evans, 'The Double-Edged Sword: Religions Influences on International Humanitarian Law' (2005) 6 *Melbourne Journal of International Law* 1

[209] Richard Falk, 'Religion and Global Governance: Harmony or Clash' (2002) 19 *International Journal of World Peace* 2, cited *verbatim* in Baderin, 'Religion and International Law', 649

[210] Nathaniel Berman, 'The Sacred Conspiracy: Religion, Nationalism, and the Crisis of Internationalism' (2011) *Leiden Journal of International Law* 1, 42, citing Martti Koskenniemi, *The Gentle Civiliser of Nations* (CUP 2004). On this topic, see also how Christianity (and Catholicism in particular) has been fundamental to the creation of PIL: James Brown Scott, *The Catholic conception of international law: Francisco de Vitoria, founder of the modern law of nations, Francisco Suárez, founder of the modern philosophy of law in general and in particular of the law of nations: a critical examination and a justified appreciation* (Carnegie endowment for international peace 1934)

[211] Abdullahi A An-Na'im, 'The Best of Times and the Worst of Times: Human Agency and Human Rights in Islamic Societies' (2004) 1(1) *Muslim World Journal of Human Rights,* cited in Baderin, 'Religion and International Law', 658

[212] As background, see Atalia Omer, 'Can a Critic Be a Caretaker too? Religion, Conflict, and Conflict Transformation' (2011) 79(2) *Journal of the American Academy of Religion* 459

should therefore [always] be accommodated', or that it should be kept strictly separated from PIL.[213] Like all law, including PIL, religious norms both contribute and are susceptible to power dynamics. To that effect, Mashood Baderin has argued that 'religion has never been completely exiled from international law', as both address 'fundamental issues about ordering society', 'ethical and normative regimes', and are susceptible to being 'politicised and manipulated by elites'.[214]

In transitional justice based on PIL, religion is relevant in two main ways. Firstly, abstract religious principles may influence the framework of reference for the design and development of a TJ process; secondly, religious actors may have an important function in furthering and negotiating the role of religion in society and guiding their congregations in political directions. In certain contexts religious principles constitute an important element in the normative framework of TJ, to the extent that a given society affords religion a (formal or informal) normative function and on the basis of the majority's religious sentiment. Under a liberal human rights paradigm, including religion in the debate is desirable because its exclusion or restriction 'would not only be illiberal but would stifle a valuable source of healing traumatized societies'.[215] Furthermore, the reality on the ground in Muslim-majority settings – as investigated in this thesis – suggests that religion is being invoked in transitional contexts, as demonstrated in the debate around the Arab Uprisings.[216] This example reaffirms the pluralistic nature of TJ, in which international law and unofficial and religious norms coexist.

Constructive synergies between the aims of TJ and religious principles should be explored. With reference to the Abrahamic faiths, Daniel Philpott argues that the concept of 'justice' tends to be highly valued by religion: for instance, it is reflected in the 'purposes, character and actions of God'.[217] Furthermore, the notion of 'reconciliation' and the 'restoration of a broken relationship' are features of both transitional justice and religion; notably, forgiveness, 'the most distinctive, innovative and controversial practice' offered by religion engages the 'amnesty v. accountability' debate in TJ.[218] But religion and TJ may also interact at a psychological level, which then affects the law. Michael Bohlander remarks that transitional justice is 'also and to a large part about religious psychology and parental as well as peer-group-based behavioural

---

[213] Baderin, 'Religion and International Law', 643 et seq

[214] Ibid, 638 et seq, citing SD Jamar, 'Religion and International Law' (2001) 16 *Journal of Law and Religion*, 609

[215] Daniel Philpott, 'What religion brings to the politics of transitional justice' (2007) 61(1) *Journal of International Affairs* 93, 95, 100; and also D Philpott, 'Religion, reconciliation, and transitional justice: The state of the field' *Social Science Research Paper Working Paper* (17 October 2007)

[216] For a background, see inter alia: Katerina Dalacoura, 'The 2011 uprisings in the Arab Middle East: political change and geopolitical implications' (2012) 88(1) *International Affairs* 63-79; Chatham House, Transitional Justice and the Arab Spring, 1 February 2012, report available at http://www.chathamhouse.org/publications/papers/view/182300 [accessed 15 November 2013] (event attended by the author). See also Criminal Justice and Accountability in Arab Transition Processes, Expert conference jointly organised by: The Center for International Peace Operations (ZIF), the Cairo Regional Center for Training on Conflict Resolution and Peacekeeping in Africa (CCCPA), and the Criminal Law and Judicial Advisory Service (CLJAS) of the United Nations Department of Peacekeeping Operations (UN DPKO), Cairo, 25 – 27 September 2012, report available at http://www.zif-berlin.org/fileadmin/uploads/analyse/dokumente/veroeffentlichungen/ZIF_Conference_Report_Arab_Transition_Processes.pdf [accessed 1 May 2014] (attended by the author). The participants were scholars, independent experts, politicians, jurists, field practitioners, and diplomats including representatives from the United Nations and other international organizations.

[217] Ibid, 106

[218] Ibid, 97 et seq

conditioning'.[219] This proposition resonates with Leon Petrazycki's psychological and sociological analysis of emotions in relation to 'legal impulsions' giving rise to so-called 'intuitive unofficial law', that is, people's spontaneous behaviour guided by their legal intuitions rather than by statutes or other normative facts.[220] Intuitive unofficial law complements positive official law (i.e. domestic law enforced in state courts), positive unofficial law (described by Adam Podgorecki as 'a mediator or unofficial agency resolving a conflict with reference to positive law or normative facts') and intuitive official law (for example, the *ratio decidendi* of a court judgment based on equity).[221] Consequently, even in formally secular contexts, religious principles may still emerge in the form of 'legal impulsions' that affect the TJ process.

Religious actors influence TJ according to the degree of their 'institutional autonomy from the state' before and after the transition.[222] Aaron Boesenecker and Leslie Vinjamuri agree that 'local faith-based actors' have 'played a pivotal role in adapting international accountability norms and embedding them in local practice'.[223] These civil society actors have the advantage of being generally separate from the formal state apparatus.[224] Past examples of religious actors detached from the authorities who have been able to promote truth commissions include Archibishop Tutu in South Africa and Bishop Gerardi in Guatemala.[225] But when religious leaders 'acquiesced to tyranny, civil war and genocide and were impotent in the aftermath' or were 'integrated with the state', the possibility of taking on a constructive role in TJ was compromised (e.g. the Catholic Church in Argentina and the former Yugoslavia's three religious communities aligned to nationalist politicians).[226] More recently, al-Azhar, a leading centre for (Sunni) Islamic jurisprudence has taken part in the in the TJ debate of the Arab Uprisings (discussed in more detail in chapter 5), displaying its contentious political role in Egyptian society and across Muslim-majority societies.[227] In practice, therefore, the role of religious leaders in TJ is comparable to that of secular civil society actors.

Civil society actors, including religious leaders fall in four broad categories identified by Boesenecker and Vinjamuri: norm makers, norm adaptors, norm facilitators and norm reflectors in 'bridg[ing] the gap between international norms and local practice'.[228] Faith-based organisations are primarily norm-makers, governed by values embedded in organisational 'beliefs and practices' and 'faith doctrines'; as such, when facing a tension between theological principles and IHRL, they tend to sacrifice the latter.[229] Norm adaptors are

---

[219] Michael Bohlander, 'Political Islam and Non-Muslim Religions: A Lesson from Lessing for the Arab Transition' (2014) 25(1) *Islam and Christian-Muslim Relations* 27, 32

[220] Adam Podgorecki, 'Unrecongnized Father of Sociology of Law: Leon Petrazycki - Reflections Based on Jan Gorecki's Sociology and Jurisprudence of Leon Petrazycki', (1980-1981) 15 *Law & Soc'y Rev*. 183, 189

[221] Ibid, 191 et seq. This article relies on Leon Petrażycki, *Law and morality* (Transaction Publishers 2011) (based on previous works of the early 1900s) and Jan Gorecki, *Sociology and Jurisprudence of Leon Petrazycki* (Urbana University of Illinois Press 1975)

[222] Philpott, 'What religion brings to the politics of transitional justice', 102, 107

[223] Aaron P Boesenecker and Leslie Vinjamuri, 'Lost in Translation? Civil Society, Faith-Based Organizations and the Negotiation of International Norms' (2011) 5 *IJTJ* 345

[224] Ibid, 347 et seq. Similar themes are discussed in Leslie Vinjamuri and Aaron P. Boesenecker, 'Religious Actors and Transitional Justice' in Thomas Banchoff (ed), *Religious Pluralism, Globalisation and World Politics* (CUP 2008)

[225] Philpott, 'What religion brings to the politics of transitional justice', 107

[226] Ibid, 104

[227] The al-Azhar Declaration in Support for the Arab Revolutions, 31 October 2011, translated by Adel Maged and Alice Panepinto, available at www.dur.ac.uk/ilm [accessed 30 June 2013]

[228] Boesenecker and Vinjamuri, 'Lost in Translation?', 352 et seq

[229] Ibid, 353

'highly pragmatic actors' and negotiators operating at 'the interface of the local and the international, seeking to adapt the international accountability norm to fit with local political constraints and culture'.[230] Norm facilitators 'embrace, embody and disseminate international expectations for accountability', acting as 'agents of the international human rights community' seeking to 'ensure that local practices governing peace, justice and accountability are consistent with international standards'.[231] Finally, norm reflectors are highly localised and closely reflect the culture of their environment; as such, they may resist engagement with international law or any other norms perceived as foreign.[232]

Norm adaptors and norm facilitators are most likely to develop conceptions of TJ that meet international law standards and are also inclusive of local justice and religious principles. In light of the inherent pluralism of TJ, which relies on a variety of sources including 'intuitive unofficial law', these actors may play an important part in synthesising and balancing competing norms applicable to transition. A critical awareness of the dynamic legal framework of TJ may overcome standoffs between different actors as agents of different norms. This approach also carries the potential to enable a greater range of perspectives as well as more inclusivity in the TJ process. By basing TJ on a wider set of relevant norms, PIL and religious values coexist and the aims of justice, accountability and reconciliation may enjoy a deeper societal meaning and thus contribute to bottom-up ownership of the process.

In brief, this section discussed a paradox: transitional justice based on international law cannot only rely on international law. By acknowledging the bottom-up normative influences that impact on the design and implementation of transitional justice (in addition to domestic law, which this thesis does not address directly), this section has shown how local justice and practices, including religious normative values as an example of intuitive unofficial law, make up an important part of the framework of reference that overlaps with international law. Thus, the rules of TJ can be understood from the perspective of legal pluralism, where different sets of norms coexist depending on the context. In general, and in TJ settings, the relationship between religion and international law plays out at two levels: the first is abstract and relates to principles, and the second is concrete, based on the actors that determine the dialogue between the two sets of rules. The latter also brings to the fore the profane character of religious law when it meets political interests in the context of transitional justice. Therefore, a pluralistic understanding of the legal framework of TJ reveals a greater spectrum of applicable rules beyond international law – as well as the power struggles and compromises of transitional stakeholders.

[230] Ibid, 355 et seq
[231] Ibid, 359 et seq
[232]Ibid, 361 et seq

7. Conclusions

Transitional justice is a range of mechanisms and policies associated with a society's attempt to face a legacy of past abuse at times of radical political change, as well as the distinctive notion of justice in transitional contexts. The transitional aims of accountability, justice and reconciliation are pursued by a variety of judicial and extrajudicial means, whose backward-looking intentions also reflect forward-looking goals. Transitional justice based on international law relies heavily on ICL, IHRL and (to a much lesser extent) IHL. These sources are complemented by bottom-up normative influences such as local justice and practices, including religious normative values, that coexist with international law within the framework of legal pluralism.

Given the deeply contextual nature of each TJ process, it is impossible to sketch a blueprint normative framework of reference. The combination of international law and local norms helps understand the complexities of the field. Regardless of whether TJ constitutes an ordinary or an extraordinary form of justice, its present-day steady-state is determined by the existence of permanent global mechanisms, which pose new political challenges. The role of international criminal justice in transitions has been gradually eclipsed by the ascent of IHRL, shifting away from perpetrators of harm and towards victims, survivors and societies at large. The human rights approach to TJ may be better-suited to addressing the range of root-causes of conflict in view of social justice, human development and sustainable peace. In the context of legal pluralism, TJ can also draw on local informal norms – including religious law – which foster local ownership of the process.

Ultimately, the normative framework of each transitional setting will differ from one scenario to the next. The balance between global and local norms in TJ is a policy decision specific to each setting – though it may reflect political manipulations or exacerbate structural inequalities or establish new forms of social violence. With regards to reconstructing narratives of the past, the tensions between different norms may conceal competition between different actors and interest groups that shape the process. For this reason, to avoid the entrenchment of marginalisation of certain individuals and communities not only in TJ processes but also in the post-transitional society, diverse participation under a framework of legal pluralism is likelier to capture the complexities of ensuring accountability, serving justice and achieving reconciliation. The following chapter will analyse the uncovering of historical accounts of past abuse, and consider the complex relationship between TJ, truths and collective memories.

II. Legal Truths, Judicial Rituals and Transitional Justice

1. Introduction

The discovery of the truth and the role of narratives about the past are a key feature of transitional justice.[1] Ruti Teitel has argued that truth and historical accountability alter the political landscape, and that the reconstruction and public recognition of truths may set in motion 'other legal responses, such as sanctions against perpetrators, reparations for victims, and institutional change'.[2] Beyond its collective political effects, recognising the truth contributes to the psychological healing of victims of gross human rights abuses.[3] Thus, how the reconstruction of the truth is formed affects the TJ process for individual survivors of past abuse as well as their communities. As truth-seeking links to each of the aims of accountability, justice and reconciliation, this thesis will consider the truth as a distinguishing crosscutting theme of TJ. This chapter investigates the formation, effects and limitations of uncovering the truth through formal proceedings in which competing narratives are decided, exerting an effect both between parties and on society more broadly.

The understanding of the truth adopted in this thesis is based on Heidegger's interpretation of Plato's Allegory of the cave: the truth is that which is unhidden, as in not concealed (by actors interested in keeping the truth hidden) and the related ability (possibility) to comprehend that which is uncovered.[4] This twofold appreciation of the truth is particularly suited to the context of TJ, in which efforts to obscure the past and its consequences shield perpetrators from being accountable for their violations thus compromising justice and reconciliation. While both moments are inherently political, uncovering the truth is a backward-facing endeavour, whereas its interpretation is more forward-looking.

This chapter analyses how the truth can be discovered and interpreted in TJ by distinguishing between the notions of legal truths and factual historical truth. The first part considers the complex relationship between truth and TJ. The second part explores the notion of legal truth, its formation and limitations. It considers how the legal truth shapes historical accounts, and looks into how stakeholders in truth-seeking processes influence its course. The final part examines the ritual and performative characteristics of formal truth-seeking such as trials and truth commissions – as well as any potentially comparable mechanism recognised by a community – in forming collective memories. In the broader context of the research question, this chapter analyses the notions of legal truth and collective memory as resulting from a clearly-defined process or framework. While constituting a distinctive feature of TJ, upon further scrutiny, formal truth-seeking

---

[1] Ruti G. Teitel, *Transitional Justice* (OUP 2000), 88 et seq

[2] Ibid

[3] See references to the truth and the social-psychological healing of victims in, *inter alia*: Ifi Amadiume, and Abdullahi An-Na'im (eds), *The Politics of Memory: Truth, Healing, and Social Justice* (Zed Books 2000); Naomi Roht-Arriaza, 'The New Landscape of Transitional Justice' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (CUP 2006), 4; Roman David and Suzanne Y.P. Choi, 'Getting Even or Getting Equal? Retributive Desires and Transitional Justice' (2009) 30(2) *Political Psychology* 161; Jonathan Doak, 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions' (2011) 11(2) *International Criminal Law Review* 263; James L. Gibson, 'The Contributions of Truth to Reconciliation Lessons From South Africa' (2006) 50(3) Journal of Conflict Resolution 409; Martha Minow, *Breaking the cycles of hatred: Memory, Law and Repair* (Princeton University Press 2002). For a more critical appraisal of the healing and reconciliatory power of truth-seeking in transitional justice, see Kieran McEvoy, *The Trouble with Truth: Struggling with the Past in Northern Ireland* (Routledge 2011), cited in Kieran McEvoy, 'What Did the Lawyers Do During the 'War'? Neutrality, Conflict and the Culture of Quietism' (2011) 74(3) *Modern Law Review*, 350, fn 195

[4] Martin Heidegger, *The Essence of Truth* (Continuum 2002), 47 et seq

mechanisms display a ritual character situated within the culture and expectations of the beneficiary communities (and stakeholders) – this includes international law as well as local understandings of justice.

2. Truth and Transitional Justice

Truth and transitional justice are linked in two separate but related ways: through the notion of accountability, and as a precondition of pursuing justice and reconciliation. In the first instance, truth can be discovered through a variety of transitional justice means either directly, such as in the case of truth commissions and inquiries whose specific purpose is to investigate the past, or obliquely, through trials, reparations programmes, vettings and institutional reform, in which truth-finding is not an aim but a result. In the second instance, the facts and narratives emerging from TJ mechanisms formalise accounts, responsibilities and victimhood, establishing official versions of the past and thus contribute to long-term goals, such as reforming state institutions, rewriting basic laws, redistributing resources more fairly and removing key agents of abuse to rebuild a society's future.

Grasping the definitive philosophical concept of the truth cannot be fully investigated in this thesis for a number of reasons. Firstly, the breadth of scope and effects of 'the truth' would not be captured in full and with a sufficient degree of nuance without an ambitious interdisciplinary study beyond the scope of law. Secondly, the possibility of relying on the narrower, more formal notion and functions of 'legal truth' allows lawyers to focus on some of the salient features of the truth for the purposes of transitional justice. However, going beyond the law helps inform our understanding of the truth for the purposes of TJ, a discipline which cannot afford to be a sterile legal endeavour.

One of the main tensions within transitional justice is the balance between truth and justice, often presented in an adversarial model.[5] Priscilla Hayner describes it as a 'careful but critical relationship', noting the 'false duality' of assumed trade-offs between truth and justice, typified in the fear that truth commissions set out to avoid formal prosecutions and exonerate from criminal responsibility.[6] This is not necessarily the case, as demonstrated by the frequent recommendations in the final reports of truth commissions to open criminal proceedings on the basis of the discoveries.[7] Even Ruti Teitel rejects the 'truth v justice' tension, opposing the zero-sum trade-offs between the two and the choice of either a criminal or a historical inquiry.[8] Instead, she presents the truth as 'a virtue of justice', which is neither synonymous nor independent of it.[9] The question rests on the sort of truth which is being pursued; this encompasses the extent to which societies and new political leaders accept 'multiple representations of the "truth"', given the tendency of successor governments to focus on one narrative in order to facilitate a smoother political transition.[10] Thus, the links between historical justice and other forms of justice include 'establishing past wrongdoings' which 'gives victims a form of reparation', 'delineating a line between regimes', using the findings to make

---

[5] This tension has been widely rehearsed in the transitional justice literature. See, *inter alia*, Juan E. Mendez, 'In Defense of Transitional Justice', in James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press 1997); Neil J Kritz, 'The Dilemmas of Transitional Justice' in Neil J Kritz (ed) *Transitional Justice* (United States Institute of Peace Press, 1995) xix; Jose Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations', (1992) 43 *Hastings Law Journal* 1425

[6] Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2011), 91 et seq

[7] Ibid, 93 et seq. The examples of this provided by Hayner are Argentina, Peru and Chad

[8] Teitel, *Transitional Justice*, 89. In this context, Teitel notes how "truth inquiries in some countries have been considered not a prelude but an alternative to punishment"

[9] Ibid

[10] Ibid

recommendations for structural changes and 'attempts to transform public opinion regarding state tyranny'.[11] Thus, truth-seeking is able to catalyse justice as a process which includes accountability for past abuse as well as future justice as reconciliation.

The relationship between truth and justice is complemented by the links between truth and reconciliation. In this regard Colm Campbell and Catherine Turner note how truth may be subjected to the interests of reconciliation, which include 'selection and championing of only those truths useful in a reconciliation-focused teleology'.[12] This involves the political decision to favour some accounts over others, giving a voice to certain survivors while marginalising others, thus constructing a narrative of truth which reflects the ultimate goals of the transitional process instead of accounting for the factual harm suffered by victims. The relationship between truth and justice is also problematized by the possibility of amnesty. With reference to both the Latin American and the Eastern European transitions, Naomi Roht-Arriaza notes how the use of amnesties traded 'justice for the past in exchange for justice for the future'.[13] This highlights how the need for societies to reconcile after mass abuse and move on has at times sacrificed the need to account for that abuse and apportion responsibilities. Recently, this antagonistic model of 'truth v justice' seems to be resolving in favour of a complementary approach.[14] Recognising the interdependence between the three transitional aims of accountability, justice and reconciliation helps acknowledge that the truth does not only relate to accountability, but is in effect a crosscutting theme of justice and reconciliation.

Reaffirming the crosscutting effects of the truth in transitions, UN Special Rapporteur Pablo de Greiff lists three ends of TJ closely connected to historical justice: (1) recognition of victim status; (2) promotion of civic trust (both horizontal, between citizens, and vertical, between citizens and state institutions); and (3) the strengthening of the democratic rule of law.[15] The acknowledgment of victim status and recognition of the abuse suffered provides a forum for sharing survivors' accounts, minimising the marginalisation of their voices in the public sphere. Seeing victims also as rights bearers and citizens is equally important: trials, truth-seeking mechanisms, reparations and institutional reforms all contribute to this end.[16] Therefore, the discovery of the truth as a component of transitional justice is beneficial to individual victims, as well as useful for fostering a collective process of civic trust and the strengthening of the rule of law, which are essential in forward-looking transitional justice. Focusing just on criminal retribution misrepresents the broader aims of transitional justice, which encompass a collective forward-looking effect as much as a

---

[11] Ibid, 90. Relatedly, 100 et seq, stressing the importance of 'future access' to information, such as state archives, in times of transition and afterwards

[12] Colm Campbell and Catherine Turner, 'Utopia and the doubters: truth, transition and the law' (2008) 28(3) *Legal Studies* 374, 381 et seq

[13] Naomi Roht-Arriaza, 'The New Landscape of Transitional Justice' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (CUP 2006), 3

[14] Ibid, 8

[15] Pablo de Greiff, 'Some thoughts on the Development and Present State of Transitional Justice' (2011) 5(2) *Journal for Human Rights/Zeitschrift fur Menschenrechte* 98, 114 et seq. In relation to the promotion of civic trust, however, some transitional justice policies, such as forced DNA testing, may in fact impede civic trust insofar as it contravenes the right to privacy; for a discussion of this issue, see Elizabeth B Ludwin King, 'A Conflict of Interests: Privacy, Truth and Compulsory DNA Testing for Argentina's Children of the Disappeared' (2011) 44 *Cornell International Law Journal* 535

[16] Ibid

backward-looking premise, as well as responding to the specific needs of each given scenario.[17] As such, a truth relevant to specific victims and perpetrators carries a collective effect in reconstructing the past for a better future.

The dual backward and forward-looking nature of TJ described by Teitel[18] suggests that truth cannot be divorced from time and context, and may take on differing meanings accordingly. Drawing on Benedetto Croce, Yasmin Naqvi recalls that 'truth is relative to present interest':

> The relativism of truth is a concept that becomes important in the legal formulation of the right to the truth, because we can work out what information needs to be provided according to the needs of the rights-holder.[19]

Similarly, Patrick O'Callaghan proposes an ontological vision of the past that 'forms a foundation of our actual consciousness', which in turn 'has implications for both policy-making and our understanding of law'.[20] Drawing on Gadamer, he identifies the option of employing a 'presentist' perspective of the past, instead of respecting the 'pastness of the past'.[21] This may be a distinctive feature of law's interpretation of the past; Walter Otto Weyrauch has suggested that, although 'both law and history are concerned with the meaning of the past', 'law is more concerned with the subjection of past pronouncements to present social needs'.[22] In the context of transitional justice, this reveals that truth-seeking and the truth itself are approached from a present (and future) perspective in order to accommodate transitional aims. This does not imply that the validity of the truth should be compromised or its factual relevance modified to obey the political imperatives (or forces) of transition. Instead, more subtly, it suggests that the past which is uncovered may not be approached systematically or holistically, due to that 'presentist' perspective that determines the focus, scope and depth of inquiry into the past.

Philosophy, and in particular epistemology, has addressed questions of truth in relation to knowledge, highlighting the descriptive and normative functions of knowledge (and truth) at individual and collective levels.[23] The processes of truth making through legal processes may be understood in light of the rich theoretical debates that have puzzled philosophers for centuries.[24] The interest of some in keeping the truth about past abuse hidden illustrates Michel Foucault's claim that 'truth isn't outside of power, or lacking in power: … Truth is a thing of this world: it is produced only by virtue of multiple forms of constraint'.[25]

---

[17] For an interesting discussion on balancing sentencing and leniency in the context of the ICTY, see Louise Mallinder, 'Retribution, Restitution And Reconciliation: Limited Amnesty In Bosnia-Herzegovina' (2009) Working Paper No. 3 from Beyond Legalism: Amnesties, Transition And Conflict Transformation, Institute Of Criminology And Criminal Justice, Queen's University Belfast November 2009, 49 et seq. On balancing retributive and restorative models in transitional contexts see, *inter alia*, Kieran McEvoy and Tim Newburn (eds), *Criminology, Conflict Resolution and Restorative Justice* (Palgrave Macmillan 2003)

[18] Teitel, *Transitional Justice*, 7

[19] Ibid

[20] Patrick O'Callaghan, 'Collective memory in law and policy: the problem of the sovereign debt crisis' (2012) 32(4) Legal Studies 642, 643

[21] Ibid, 649, citing HG Gadamer, *Truth and Method* (Sheed and Ward 1975)

[22] Walter Otto Weyrauch, 'Law as Mask-Legal Ritual and Relevance' (1978) 66(4) California Law Review 699, 723

[23] See, *inter alia*, Michael Williams, *Problems of Knowledge: a critical introduction to epistemology* (OUP 2001)

[24] For background reading on this point, see EJ Lowe and A Rami (eds), *Truth and Truth-Making* (Acumen 2009)

[25] Naqvi, 'The right to truth in international law: fact or fiction?', 252, citing Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Colin Gordon ed, Harvester Wheatsheaf 1980), 114

Moreover, 'truth is linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which extend it. A 'regime' of truth'.[26] The revelation of truth, therefore, is affected by power dynamics; at the same time, it can be used as a tool of power in a political context – including in transitional justice processes.

Frederick Schmitt outlines four types of truth: correspondent, pragmatist, coherent and deflationary.[27] The latter is different from the first three as it posits that 'truth talk is expressive (enhances the expressive power of language) rather than descriptive'.[28] This suggests that talking about the truth may actually contribute to constructing the truth, reflecting Austin's theory of 'performative utterances'.[29] Schmitt himself critiques the very need to define the truth at all;[30] nevertheless, the expressiveness of truth is an important concept to consider in relation to transitional justice inasmuch as it highlights the constructive force of official accounts about the past in establishing certain narratives over others. As a social matter, truth 'may be generated by social procedures and structures' and it is possible for it to be 'agreed upon' .[31] In other words, truth can be presented as a construction of knowledge, or 'manufactured'.[32]

Just as it is constructed, truth is contested within the political space of transitions. Teitel considers how transitional justice implies a 'displacement of one interpretative account or truth regime by another, even as the political regimes change, while preserving the narrative thread of the state'.[33] The conservation of the new historical account can be achieved through the law, which may also be used to control other accounts which reinterpret political events and may be detrimental to the establishment of the new order.[34] However, she cautions against the 'attempt to entrench an identity based on a particular historical view', as this would be in itself an illiberal vision,[35] competing with the right of freedom of expression central to liberal states.[36] Consequently, Teitel stresses the importance of a 'plurality of narratives, instability and political dialectic'.[37] In that sense, she seems to acknowledge that it is precisely the dialogue between differing voices and competing accounts of the truth which must be reckoned with during and after the transition in order to avoid

---

[26] Ibid, citing Foucault *supra*, fn 24

[27] Frederick F Schmitt, *Theories of Truth* (Blackwell 2004)

[28] Ibid, 28

[29] John Langshaw Austin, *How to do things with words: The William James Lectures delivered in Harvard University in 1955* (OUP 1962)

[30] Schmitt, *Theories of Truth,* 28

[31] Naqvi, 'The right to truth in international law', 253

[32] Moses Chrispus Okello, 'Afterward: Elevating Transitional Local Justice od Crystallizing Global Governance?' in Rosalind Shaw and Lars Waldorf (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press 2010), 276

[33] Teitel, *Transitional Justice*, 115

[34] Ibid, 105 et seq. Examples of legal limitations of certain accounts and the barring of certain individuals from influencing public debates can be found in post-war constitutions and later court decisions. In Italy, Article XII of the 'Transitory and Final Provisions' of the 1948 Constitution introduced a temporary political lustration of the Fascist cadres, limiting their voice in the political debate of the newly founded republic. In Germany, in the recent Wunsiedel case [Case No. 1 BvR 2150/08, paras. 1–110, 4 Nov. 2009] the German Federal Constitutional Court (*Bundesverfassungsgericht*) held that the prohibition of neo-Nazi gatherings on symbolic days for the movement did not violate the constitutional right to freedom of expression. See Mehrdad Payandeh, 'The Limits of Freedom of Expression in the Wunsiedel Decision of the German Federal Constitutional Court' (2010) 11(8) *German Law Journal* 929, Teitel, *Transitional Justice*, 103 et seq, and Roht-Arriaza, 'The New Landscape of Transitional Justice', 13

[35] Teitel, *Transitional Justice*, 117

[36] Ibid, 108

[37] Ibid, 117

a shift to another illiberal regime. Support for historical transitional justice that reckons with internal contradictions is offered in the ethical perspective of deconstruction provided by Drucilla Cornell:

> Deconstruction necessarily presupposes an ethical relationship to others; deconstruction requires us not only to recognise others as others but also to be open to them and their perspectives. Thus, deconstruction contains an ethical imperative both to question our own beliefs and to understand the situation and views of others.[38]

Against this background of commitment to the truth in the context of multiple narratives, including those put forward by members and supporters of the previous illiberal regime, historical transitional justice sketches a sufficiently nuanced image of past facts for a torn society to continue discussing. As such, scholars and practitioners of transitional justice in various settings may benefit from adopting a critical, interdisciplinary approach to interpreting the legal framework to deliver historical transitional justice, of which the truth – and the developing right thereof (as discussed in chapter 3) – is a key component.

Taking stock of these theoretical premises, historical transitional justice has relied heavily on the distinctive notion of legal truth. But 'legal and historical truth are far from identical', as Martti Koskenniemi admonishes.[39] Borrowing Jacques Derrida's point that 'there is nothing outside the text; all is textual play with no connection with original truth', Yasmin Naqvi suggests that 'the truth starts to look more like a right to an official statement about what happened', bringing about an 'obligation on the part of the state to disclose something' and a 'matter of the use of language by the state'.[40] Indeed, the formal recognition of facts about past abuse through a prescribed procedure authorised by a set of norms (existing or new) helps elevate a narrative (or set of narratives about the past) to the status of an official account. Once a portrayal of the past enjoys formal endorsement by a competent (but not necessarily legitimate) authority, that account of the truth becomes both an end in itself as well as a means to other transitional aims linked to reforming society towards reconciliation. For this reason, both trials and truth commissions[41] – and potentially any other formal transitional mechanism that investigates the past directly or indirectly – can deliver legal truths. Trials and truth commissions constitute the core legal tools of transitions.[42] In the context of historical transitional justice, the assumption that criminal trials deliver justice and truth commissions uncover the truth has been convincingly rejected.[43] Instead, they both contribute to establishing the 'legal truth' about past abuse, which impacts on individuals as well as on societies at large. Trials are often necessary to discover and act upon the truth in ways that truth commissions may not; likewise, truth commissions, in many transitional settings, may discover a broader set of truths than those of formal criminal trials.

---

[38] Drucilla Cornell, *The Philosophy of the Limit* (Routledge 1992), quoted in JM Balkin, 'Deconstruction', in Dennis Patterson (ed), *A Companion of Philosophy of Law and Legal Theory* (Blackwell 2010?) 367, 372

[39] Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck UNYB* 1, 10

[40] Naqvi, 'The right to truth in international law', 250 et seq, citing Jacques Derrida, *Prophets of Extremity* (University of California Press 1985); Jacques Derrida, *Of Grammatology* (transl. Gayatri Chakravorty Spivak tr, Johns Hopkins University Press 1976)

[41] For the most comprehensive study on truth commissions, see Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2011)

[42] Alison Bisset, *Truth Commissions and Criminal Courts* (CUP 2012), 1 et seq. In support of this, Bisset cites *inter alia* Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (CUP 2006) and Charles Villa-Vicencio, 'Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions' (2000) 49 *Emory L J* 205

[43] Bisset, *Truth Commissions and Criminal Courts*, 12 et seq

Jon Elster notes that 'generally, any measures undertaken to punish wrongdoers will *ipso facto* be capable of serving the needs of the victims'.[44] This indicates that the punitive intent of criminal trials carries with it an important corollary for victims (as well as society at large) in giving formal recognition to responsibilities regarding past abuse, thus uncovering the truth. The legal truths emerging from criminal trials, in fact, have two main effects: firstly, as the *res judicata* of trial proceedings seeks to resolve a dispute between parties, its results have an *inter partes* relevance. Secondly, the acknowledgment and establishment of a set of facts that describe the dispute and the context in which it has arisen may carry an important collective function in stating an official version of the truth. The political relevance of courts' establishing facts about the past has been recognised in non-transitional settings,[45] and this dynamic, constructive approach to official truths becomes more significant in TJ contexts. Moreover, trial-based truth-seeking is actionable through IHRL, as human rights principles and laws can 'trigger (…) the application of criminal law'.[46] This facilitates the access to the right to the truth, which is one way victims of harm can demand to know the truth about past violence, as discussed in detail in the following chapter. The legal truth can thus be understood as 'the legal conception of a right owed by the state to the individual'.[47]

On the other hand, truth commissions specifically seek to uncover the truth through formalised, yet non-judicial, proceedings characterised by a non-punitive intent (or at least, not directly).[48] This mechanism is likely to include a broader range of participants, not limited to direct victims, in the quest for a better articulated account of the past; consequently, the truths uncovered through the work of truth commissions may be better-suited to including more voices and thus more narratives of the facts in order to reach a more complete picture of past abuses. These unofficial 'truth projects' have been famously described as 'narrowing the range of permissible lies',[49] 'limit(ing) the possibility of denial or trivialization of victims' experiences'.[50] A built-in feature of truth commissions is the public nature of their findings. Louis Bickford notes that: 'they transform what is often widely-known about violent past events – common knowledge – into official acknowledgment', which is 'important both for its symbolic value and for its practical effects'.[51] In other words, they elevate truth to legal truth. Moreover, truth commissions include the ability to connect with other transitional justice mechanisms, including criminal trials, 'such as prosecuting past violators of human rights or war criminals, or initiating meaningful institutional reform'.[52] Thus, the truths uncovered in truth

---

[44] Jon Elster, 'Coming to terms with the past. A framework for the study of justice in the transition to democracy', (1998) 39(1) *European Journal of Sociology* 7, 24

[45] A notable example of this kind of legal truth in a political setting is provided in the ominous 21,000 word Italian Court of Cassation case involving seven time Prime Minister Giulio Andreotti: the nine judge panel painstakingly described his dealings with senior mafia bosses, regardless of the fact that an applicable statute of limitations (prescription) prevented the court from formally finding the defendant guilty. The point of the exercise was not the conviction of Mr Andreotti, which was impossible given the procedural limitations of the case; instead, the court handed the Italian public a formal yet accessible document describing years of corrupt politics. See Corte di cassazione, Sezioni unite penali, Sentenza 24 novembre 2003, n. 45276, available in Italian at http://www.eius.it/giurisprudenza/2003/140.asp [accessed 10 July 2014]

[46] Francoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *J Intl Crim Justice* 577

[47] Naqvi, 'The right to truth in international law', 249 et seq

[48] For an analysis of truth commissions see Hayner, *Unspeakable Truths*

[49] Michael Ignatieff, 'Articles of Faith,' (1996) 25(5) *Index on Censorship* 113

[50] Louis Bickford, 'Unofficial Truth Projects', (2007) 29 *HRQ* 994, 997

[51] Ibid

[52] Ibid

commissions may play an important role within the broader transitional justice process, beyond the mere establishment of legal truths.

The discussion around the truth in relation to historical transitional justice and the notion of legal truth as something separate from facts and history brings to light the inherent flaw of truth-seeking as part of transitional initiatives: any truth found is unlikely to be the mere description of historical fact. If we combine Derrida's view that textual play dominates accounts of the truth with Foucault's critique of the truth as a by-product and tool of power structures, the quest to uncover the truth about the past may seem pointless. However, by acknowledging that truth-seeking in the context of transitional justice is inherently 'presentist', the contradictions within the truth can be understood in their critical context: truth (including legal truths) offers and synthesises a plurality of competing narratives that pave the way for political dialectics, as indicated by Teitel, that may shape other aspects of transitional justice, such as institutional reforms. In this context, a deconstructive analysis of the truth can engage a given conviction about the truth, as well as opposing views, a facet which, according to Cornell (discussed above), captures the ethical imperative to question beliefs held. As such, we have the possibility (or the imperative) of critically contesting the truths constructed by trials and truth commissions, and challenging the rules of procedure as well as substantive norms that may elevate truth to the sacredness of legal truth; regardless of their factual validity, the political uses of truths determine transitional justice.

3. Legal Truths in Transition

An example of the effects of the legal truth on TJ can be found in the context of the *Milošević* trial, halted after the death of the defendant,[53] in relation to which ICTY prosecutor Carla Del Ponte indicated that:

> The lack of a judgment has not deprived the four-year trial from achieving some of its objectives, in particular that of satisfying to some extent the right to the truth or settling down a historical record.[54]

This statement indicates that the trial documents published by the ICTY have had a political effect in establishing and providing a formal record of the truth, regardless of the fact that the defendant died before a judgment was possible. Some have indicated that the legal truth is 'merely a by-product of a dispute settlement mechanism'.[55] The notion of legal truth, however, is more complex.[56] Constitutive theories of law suggest that 'law is not simply an instrument for enforcing a system of morality or justice but is also "part of a distinctive manner of imagining the real"'.[57] Robert Summers defines 'formal legal truths' as 'whatever is found by the legal fact-finder (judge or lay jurors or both), whether it accords with substantive truth or not', drawing on Hans Kelsen's identification of a created legal fact, which may exist in the sphere of law, although it has not occurred in the sphere of nature.[58] This perspective fits the analysis presented in the previous section, which suggested that truth does not necessarily follow historical reality and thus should be understood in its political context and in light of power structures within society.

The political power of the law extends to the creation of narratives. Implicitly expanding the notion of legal truth beyond the *res judicata* and corollary documents, Jack Balkin argues that 'law creates truth – it makes things true as a matter of law' and 'in the eyes of the law'.[59] He contends that 'law is continuously proliferating truth into the world'; by 'making things real', it has power in two ways: 'it can make things true or false in a way that matters to us' but also 'because it has power over us'.[60] Law 'creates legal knowledge', it is 'a form of cultural software that shapes the way we think about and apprehend the world', in a way 'compromis[ing] one's ability to understand what is true, because what is true from the standpoint of law is not really true'.[61] Judges, therefore, play a crucial role in constructing the legal truth about past abuse; consequently, their vision of society and politics is likely to trickle down into the official narratives of truth they construe.[62] Moreover, law 'is intertwined with, supports and is supported by the power and authority of

---

[53] *Milošević Case* (Order Terminating the Proceedings) ICTY-02-54-T (14 March 2006)

[54] Ibid, 247, citing Press Conference by ICTY prosecutor, Carla Del Ponte, The Hague, 12 March 2006

[55] Ibid, 246

[56] For a theoretically engaging discussion of the legal truth, see Michael S Moore, 'The Plain Truth about Legal truth' (2003) 26 *Harvard J of Law and Public Policy* 23

[57] Clifford Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective', in *Local Knowledge: Further Essays in Interpretative Anthropology* (1983)167, 184, cited in Paul Schiff Berman, 'Telling a Less Suspicious Story' in Austin Sarat and Jonathan Simon (eds) *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism*, (Duke University Press 2003), 107

[58] Robert S Summers, 'Formal legal truth and substantive truth in judicial fact-finding – their justified divergence in some particular cases' (1999) 18 *Law and Philosophy* 497, 498; quoting Hans Kelsen, 'Sovereign Equality of States' (1994) 53 *Yale Law Journal* 207, 218 fn 1

[59] Jack M Balkin, 'The Proliferation of Legal truth' (2003) 26 *Harvard Journal of Law and Public Policy* 5, 6

[60] Ibid, 7

[61] Ibid, 7-10

[62] For a critique of the role of the judiciary in transitions, see *inter alia* Hakeem O Yusuf, 'The Judiciary and Constitutionalism in Transitions: A Critique' (2007) 7(3) *Global Jurist*

the state', or of equivalent political forces that dominate transitional justice policies.[63] These presumptions are controversial, as they presuppose (perhaps mistakenly) and support (perhaps unjustifiably) the idea that the power and authority of the state are in place and will operate the legal system according to the rule of law, and thus would be able to deliver legal truth legitimately and effectively in the course of transition. For this reason, a variety of means to find the legal truth – such as truth commissions, but also non-criminal judicial proceedings may help overcome institutional limitations that affect criminal trials.

It is important, however, not to underestimate the force of truths derived from unofficial truth-seeking processes – that is, mechanisms other than formal trials or official truth commissions. Unofficial Truth Projects (UTPs), rooted in civil society organisations such as NGOs or universities, rather than in state-based efforts, also contribute to uncovering the truth about past abuse.[64] It has been noted that one of the primary advantages of UTPs is the 'community level truth-telling' they entail.[65] Comparable considerations could be drawn from traditional forms of truth telling, as was the case in the Rwandan *gacaca*.[66] Indeed, as long as the truth-seeking processes are recognised in the society they seek to serve, a degree of formalism is met, regardless of the specific shape they take. Thus, artistic expressions that describe past sufferings through literature, drama, visual arts and music may all contribute to truth-seeking ends at community level.

Legal truths can be recycled elsewhere. For example, in *Milošević* the ICTY decided to lift the confidentiality of certain information after the death of the accused in order to facilitate other related proceedings.[67] This possibility was discussed where there was 'a sufficient nexus' based on 'substantial geographical and temporal overlap' between cases,[68] or when individuals had been jointly accused.[69] Moreover, other truth-seeking projects in the Balkans (notably in Kosovo) have been able to use some of the legal truths of the *Milošević* trial.[70] This reaffirms the potential political uses of legal truth for entire regions that share a history of past abuse, highlighting the potential overlap between individual cases and society as a whole.

Trials and truth commissions are able to share information and feed into each other's work if there is the political will to do so. For instance, criminal proceedings and truth commissions can be set up as complementary, leading to legal truths which embody characteristics of both mechanisms. In Mexico, the

---

[63] Balkin, 'The Proliferation of Legal Truth', 11

[64] Louis Bickford, 'Unofficial Truth Projects', (2007) 29 *HRQ* 994

[65] Ibid 995

[66] Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda* (CUP 2010), 186 et seq

[67] *Milošević Case* (Order Lifting Confidentiality of Relevant Materials for Investigation Purposes) ICTY-02-54-T (16 Mar 2006). On the usefulness of the findings of the Milošević trials, see also Judith Armatta, 'Historical Revelations from the Milošević Trial', (2012) 36 Southeastern Europe 10; her abstract makes it clear: "While there was no legal resolution, evidence revealed at trial provides a rich resource for historians to further examine some of the major controversies arising from the disintegration of Yugoslavia and the decade of wars that ensued"

[68] *Karadzic Case* (Decision on the accused's motion for access to ex parte filings in the Slobodan Milošević case (Srebrenica intercepts)) ICTY -95-5/18-T, ICTY-02-54-T (28 Feb 2011)

[69] *Hadzic Case* (Decision on motion on behalf of Goran Hadzic seeking access to confidential material in prosecutor v. Slobodan Milošević related to Croatia) ICTY-04-7S-PT, ICTY-02-S4-T (22 Mar 2012)

[70] Evidentiary material gathered in the Milošević trial has, however, found its way to the extraordinary Kosovo Memory book, available at http://www.kosovskaknjigapamcenja.org/?page_id=29 [accessed 18 July 2013]

Special Prosecutors Office[71] is supported by the Citizens' Support Committee made up of lawyers, historians and social scientists with the function of giving a voice to victims and to society at large,[72] and it has full power to name and gather evidence against the perpetrators of human rights violations.[73] The decision to join the truth-seeking efforts of criminal investigations and a cross-sector truth commission leads to legal truth which is grounded in both mechanisms, blurring the lines between two primary aims: individual criminal accountability on the one hand, and a collective interest in knowing the truth about past abuse on the other. A second example is the Peruvian Truth and Reconciliation Commission (*Comisión de la Verdad y Reconciliación*), which was able to pass on recorded evidence of crimes and alleged perpetrators to prosecutors.[74] Indeed, one of the aims of the Peruvian TRC was to help advance criminal prosecutions, and it did so by handing over case dossiers to the Office of the Prosecutor General (*Ministerio Público*).[75] This also resulted in expressions of legal truth that combined the perspectives of both criminal proceedings and truth commissions, whose relationship was strengthened by the sharing of information about pass abuse. Both examples suggest that legal truths can synthesise the perspectives of trials and truth commissions, while maintaining the dual *inter partes* and collective effects of accounts of past abuse.

A further example of the pursuit and formation of the legal truth from the bottom-up – involving both individual and collective effects – can be found in Argentina, in relation to the responses to the amnesty that temporarily blocked further inquiries into the past.[76] With the publication in 1984 of the *Nunca Más* report by the Argentine National Commission of the Disappeared (the CONADEP truth commission),[77] the construction of the 'public truth' of past events became a central feature of transitional justice initiatives. Thanks to the CONADEP inquiries, families of victims held in secret detention centres were able to discover the fate of their loved ones, and those accounts acquired the status of legal truth and due publicity through that mechanism.[78] The problems arose when the amnesty laws of Argentina were passed – the Full Stop Law (*Ley de Punto Final*) and the Due Obedience Law (*Ley de Obediencia Debida*) – after which victims and the general public could no longer know the truth through formal means.

As a reaction to the policy decision of banning trials through amnesty, the joint efforts of a creative judiciary and a proactive civil society found an alternative means to the legal truth: truth-finding trials/truth-trials

---

[71] The Special Prosecutors' Office for the Attention of Matters Allegedly Related to Federal Crimes Committed Directly or Indirectly by Public Servants Against Persons Linked to Social or Political Movements of the Past (*Fiscalía Especial para la Atención de Hechos Probablemente Constitutivos de Delitos Federales Cometidos Directa o Indirectamente por Servidores Públicos en Contra de Personas Vinculadas Movimientos Sociales y Políticos del Pasado, FEMOSPP*).

[72] Mariclaire Acosta and Esa Ennelin, 'The "Mexican solution" to transitional justice' in *Transitional Justice in the Twenty-First Century* 94, 105

[73] Ibid, 102 et seq

[74] Naomi Roht-Arriaza, 'The New Landscape of Transitional Justice' in *Transitional Justice in the Twenty-First Century* 1, 9

[75] Eduardo Gonzalez Cueva, 'The Peruvian Truth and Reconciliation Commission and the challenge of impunity' in *Transitional Justice in the Twenty-First Century* 70, 70 et seq

[76] For arguments as to why the Argentine example is noteworthy in theorising transitional justice trends, see Kathryn Sikkink and Carrie Booth Walling, 'Argentina's Contribution to Global Trends in Transitional Justice' in *Transitional Justice in the Twenty-First Century* 301

[77] Kathryn Sikkink, 'From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights' (2008) 50(1) *Latin American Politics and Society* 1, 6 et seq

[78] Emilio Crenzel, 'Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice', (2008) 2 *IJTJ* 173, 184 et seq

(*juicios por la verdad*).[79] These proceedings, while neither establishing criminal responsibility nor sanctioning perpetrators, set out to investigate the truth about crimes carried out under the dictatorship and ascertain the fate of the victims.[80] Elena Maculan describes these truth-finding trials as ''bottom-up' procedures in the sense that they originated as a consequence of the pleas presented by human rights associations and the families of the victims of forced disappearance'.[81] Invoking the right to the truth, families of victims of enforced disappearances petitioned various criminal courts in an attempt to access records of their loved ones, but the military who were in possession of the files refused to cooperate.[82] Consequently, some petitioned the Inter-American Commission of Human Rights, whose recommendation to the state paved the way for further investigations by the Federal Appeals Chambers in criminal matters (*Cámaras Federales en lo Criminal y Correccional Federal*).[83] Thus, the bottom-up requests of the families of the victims and the regional top-down recommendations of the Inter-American Commission put pressure on the state to continue its official truth-seeking activities through further investigations and thus not put a stop to the formation and adjustments of the legal truth. The pursuit of the legal truth, consequently, became a kind of state obligation, which could not easily be subject to politically-motivated limitations.

Although these truth-finding trials were judge-made and non-homogenous,[84] which posed challenges to fair trial guarantees,[85] the Argentine experience illustrates how the formation of legal truths in relation to transitions can be elevated to a state obligation and a related right for those persons affected. This example also demonstrates how the scope of legal truths (temporally and with regards to subject-matter) as well as its legal framework of reference responds to political decisions, which may nonetheless be affected by bottom-up demands and the application of regional international law (in this case human rights law). On this topic, drawing from H.L.A. Hart's positivist approach, Jack Balkin argues that the legal truth can be constructed in positivist terms; as such, 'a healthy degree of scepticism about the justice and morality of the existing legal systems' is appropriate.[86] Indeed, by acknowledging that 'law and morality are *not* separated' and that 'moral imagination becomes ensnared by and held in servitude to the legal',[87] the norms applicable to a given transitional justice situation will respond to prevailing moral priorities and then be imposed through positive law. As such, the legal truth is an expression of political evaluations pursuing certain objectives, giving effect to those evaluations creatively through the possibilities set out in applicable law. Therefore, the legal truth is a result of power struggles and in turn an instrument of power in presenting narratives of the past – both within the parties of a dispute and more broadly for societies as a whole facing a legacy of violence.

---

[79] For an in-depth analysis of the Argentine truth-finding trials, see Elena Maculan, 'Prosecuting International Crimes at National Level: Lessons from the Argentine 'Truth-Finding Trials'' (2012) 8(1) *Utrecht Law Review* 106 et seq. See also Sevane Garibian, 'Ghosts Also Die: Resisting Disappearance through the 'Right to the Truth'and the Juicios por la Verdad in Argentina' (2014) 12 *JICJ*, 515

[80] Maculan, 'Prosecuting International Crimes at National Level', 106

[81] Ibid, 109

[82] Ibid

[83] *Lapacó Case* (Report 21/00, case 12.059) Inter-American Court of Human Rights (9 February 2000), para 17, no 1, reported in Maculan, 'Prosecuting International Crimes at National Level', 109 et seq

[84] Maculan, 'Prosecuting International Crimes at National Level', 110 et seq

[85] Ibid, 113 et seq

[86] Jack M Balkin, 'The Proliferation of Legal truth', 14, et seq, citing HLA Hart, 'Positivism and the Separation of Law and Morals', (1958) 71 *Harvard Law Review* 593

[87] Ibid

Consequently, legal truths may carry a future normative force – e.g. with regards to institutional reforms and constitutionalisation processes[88] – but should be understood critically in light of the political context and actors that determined their creation.

3.1 The Construction and Limits of Legal Truths

The legal truth as the outcome of a truth-seeking process is also subject to the procedural limitations of specific mechanisms, which may restrict the revelation of factual evidence. In this regard, the rules of evidence[89] and other formal procedures contribute to the gap between legal truth and substantive truth.[90] This is because:

> Formal 'findings of fact' that diverge from substantive truth not by design, but merely because this is the way the process happens to work, under the peculiar circumstances of the case.[91]

Furthermore, with reference to trials, 'court procedures and the rules of evidence, though generally directed at substantive truth, are also designed to serve other ends that actually come into play in a particular case', resulting in the court failing to find the true facts.[92] This divergence, however, is not necessarily a bad thing: for example, Summers suggests it is:

> Merely the price we pay for having such a complex multi-purpose system in which actual truth, and what legally follows from it, comprise but one value among a variety of important values competing for legal realization.[93]

As competing narratives about the past coexist in the context of truth-seeking, the legal truths resulting from formal proceedings represent a temporary, context-specific compromise capable of repeated adjustments (refer back to the Latin American examples provided above). Critiques of the notion of legal truth highlight other inherent deficiencies. From a postmodernist perspective, coupled with the recognition that a multiplicity of truths may coexist, any type of legal truth may be devoid of objectivity and in essence depart significantly from the factual truth about past abuse.[94] Additionally, the limitation of what the law captures and sees – to the detriment of what it does not – indicates further ways in which legal truths discovered through formal proceedings can be distorted.[95]

Among the possible misrepresentations of fact embedded in the legal truth in transition, Colm Campbell and Catherine Turner list the public/private divide, the marginalisation (or exclusion) of certain voices (including

---

[88] On the collective impact of transitional justice measures, such as transitional constitutionalism, see *inter alia*: Ruti Teitel, 'Post-Communist Constitutionalism: A Transitional Perspective' (1994) 26 *Colum Hum Rts L Rev* 167; Keith S Rosenn, 'Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society' (1990) The *American Journal of Comparative Law* 773

[89] On the limitations posed by rules of evidence, see *inter alia*: William Twining, *Rethinking Evidence, Exploratory Essays* (2nd edn, CUP 2006); John Jackson and Sean Doran, 'Evidence', in Dennis Patterson (ed), *A companion of Philosophy of Law and Legal Theory* (Blackwell 1996) 172

[90] Robert S Summers, 'Formal legal truth and substantive truth in judicial fact-finding', 499

[91] Ibid

[92] Ibid, 499 et seq

[93] Ibid, 511

[94] Colm Campbell and Catherine Turner, 'Utopia and the doubters: truth, transition and the law', (2008) 28(3) *Legal Studies* 374, 381

[95] Ibid, 376 et seq

those of certain groups of victims) from the process, the rigidity of legal categories (thus whether or not certain facts can be considered under the law), the exclusion from certain legal responsibilities under human rights law for non-state actors, and the hegemonic qualities of law.[96] An example of the public/private law divide that distorts the legal truth in transitional justice is highlighted by feminist critiques.[97] Notably, 'women's testimony, sexual violence, (…) [and] victim identity' are absent or marginalised in accounts of past harm outlined in transitional justice mechanisms.[98] Indeed, public violence tends to overshadow private violence in accounting for past abuse, ignoring the peculiarities of patterns of violence suffered by women and their long-term impact on societies.[99] As such, 'the institutional conditions and productive effects of the commissioning of truth' in transitional justice may conceal gendered private sphere violence,[100] which may partly obscure the factual truths about past abuse.

The legal truths uncovered in transitional justice may also impose a hegemonic vision of the past. Drawing on Antonio Gramsci's work on hegemony, Douglas Litowitz argues that a legal system 'induces people to comply with a dominant set of practices and institutions' in an overarching manner, 'through its function as constitutive of social ontology'.[101] In general (non-transitional contexts), the 'law is at the same time both repressive and constitutive', and its repressive features 'clear enough from the presence of police, prisons, courtrooms with armed bailiffs, and the ever-ready national guard, which is called out to restore the status quo when a social disturbance arises'.[102] The normative effects of official accounts of past abuse may also carry hegemonic features. For example, the legal truth as a result of formal procedures of trials or truth commissions may impose an interpretation over all others of the truth on past violence and defend it through the state apparatus, limiting (or even suppressing) the destabilising effects of alternative views. Moreover, power structures and fixed identity categories affect the performative process and restrict the validity of the truth derived from them.[103] Thus, formal words uttered in law courts may perpetuate violence through the infliction of further punishments, as argued by Judith Butler.[104] As such, the violent and hegemonic properties of law are revealed, which may undermine the validity of the resulting legal truth.

---

[96] Ibid, 376 et seq

[97] See, *inter alia*, Christine Bell and Catherine O'Rourke, 'Does Feminism Need a Theory of Transitional Justice? An Introductory Essay', (2007) 1(1) *IJTJ* 23. Also, Fionnuala Ní Aoláin and Eilish Rooney, 'Underenforcement and Intersectionality: Gendered Aspects of Transition for Women' (2007) 1(3) *IJTJ* 338

[98] Vasuki Nesiah, 'Discussion Lines on Gender and Transitional Justice: An Introductory Essay Reflecting on the ICTJ Bellagio Workshop on Gender and Transitional Justice' (2006) 15 *Columbia Journal of Gender and Law* 799, cited in Bell and O'Rourke, 'Does Feminism Need a Theory of Transitional Justice'

[99] Fionnuala Ní Aoláin, 'Women, security, and the patriarchy of internationalized transitional justice' (2009) 31(4) *HRQ* 1055; and Fionnuala Ní Aoláin and Catherine Turner, 'Gender, Truth and Transition' (2007) 16 *UCLA Women's LJ* 229

[100] Anne Orford, 'Commissioning the Truth' (2006) 15 *Colum J Gender and L* 851, 883. Orford's critique is not merely feminist, and she engages an anti-capitalist perspective in analysing the aims of transitional justice.

[101] Douglas Litowitz, 'Gramsci, Hegemony, and the Law' (2000) *BYU Law Review* 515, 517

[102] Ibid, 530

[103] This is a fascinating critical angle that deserves a longer discussion beyond that feasible in this thesis. For a general understanding of some of their critical approaches, see *inter alia*, Jacques Derrida, 'Force of Law' (1989-90) 11 Cardozo L Rev 920, and a commentary on this work, John P McCormick, 'Derrida on Law; Or, Poststructuralism Gets Serious' (2001) 29(3) *Political Theory* 395; Judith Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' (1988) 40(4) *Theatre Journal* 519; Judith Butler, 'Burning Acts: Injurious Speech' (1996) 3 *U of Chicago Law School Roundtable* 199, quoting Robert Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601, quoted in Butler, 'Burning Acts', 202

[104] Robert Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601, quoted in Butler, 'Burning Acts', 202

In transitional justice, narratives about the past and the renegotiation of the legal framework as a whole impact the development of 'constitutional justice'.[105] Indeed, the opportunity to define and challenge existing or contradicting versions of legal truth may provide the momentum for revising the constitutive principles of a society even when they contradict each other. Acknowledging that law may 'come into conflict with other forms of knowledge', including historical truth, Balkin notes that legal truths may also 'distort and deform social relations'.[106] Likewise, legal truths tend to proliferate in a context of disagreement, even after historical changes in the law; indeed, 'legal indeterminacy can actually proliferate law's power by spurring people to think, talk, contest, and argue using legal frameworks, legal concepts and legal terms'.[107] Questions on the formation of the legal truth feed into transitional constitutionalism. Highlighting the constructivist features of transitional constitution making, Teitel describes two modalities of operation, one 'codifying' and expressing existing consensus, whereas the other, which prevails, is transformative, seeking to reconstruct the previous 'political order associated with injustice'.[108] As such, 'the construction of constitutional constraints' responds to 'a state's political, historical and constitutional legacies'.[109] In this context, the legal truth captures those legacies and provides a basis to renegotiate historical accounts and their normative effects at the constitutional level and beyond.

3.2 Stakeholders of the Legal Truth

The stakeholders of any given truth-seeking legal procedure have an effect on the formation of the legal truth. Victims and survivors have a special, individual interest in uncovering the truth about past abuse (as discussed in the following chapter). Political forces, including military and paramilitary groups, as well as powerful elites outside the political establishments (for instance, the judiciary or key economic leaders) may also influence the formation of the legal truth. As part of the power adjustments between 'the forces of the past and the successor elites',[110] international organisations, NGOs and bilateral donors who fund, promote or support truth-seeking mechanisms, and endorse specific narratives may also affect the formation of legal truths.[111] But above all others, the operational stakeholders of the legal truth are the legal professionals involved in both judicial and extra-judicial TJ processes.

In truth-seeking initiatives, 'lawyers' arguments and judicial opinions are attempts to share truths of practical wisdom publicly, allowing that truth be experienced, seen and felt' in the guise of 'political or legal truth'.[112] On the other hand, lawyers can also be 'enemies of the truth' if they pursue 'truth-obscuring' and 'uncertainty' as a source of business – revealing 'a fundamental tension between lawyers and the public', who instead 'benefits from truth-eliciting rules'.[113] Nevertheless, strategic legal activism in TJ can help

---

[105] Teitel, *Transitional Justice*, 191 et seq

[106] Balkin, 'The Proliferation of Legal truth', 12 et seq

[107] Ibid

[108] Teitel, *Transitional Justice*, 196 et seq, 201

[109] Ibid, 211

[110] Luc Huyse, 'Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past' (1995) 20(1) *Law & Social Inquiry* 51, 71

[111] For example, see the set of recommendations directed at donors of the *gacaca* mechanisms in Rwanda: 'Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts' (2011) Human Rights Watch, 9, available at http://www.hrw.org/sites/default/files/reports/rwanda0511webwcover.pdf [accessed 15 June 2014]

[112] Linda Meyer, 'Between Reason and Power: Experiencing Legal Truth' (1998-1999) 67 *U Cin L R* 727, 758

[113] John O McGinnis, 'Lawyers as the Enemies of the Truth' (2003) 26 *Harv J L and Pub Pol* 231

uncover legal truths, as discussed earlier in relation to the creative circumvention of amnesty laws in Argentina. Conversely, the 'culture of quietism' and the lack of engagement by lawyers may hinder transitional aims, as noted by Kieran McEvoy; likewise, an overly-technical, legalistic approach divorced from political circumstances may also devalue those aims.[114] Thus, lawyers do not simply provide neutral technical input to truth-seeking in work in TJ.

As a special category of lawyers, the judiciary interprets and applies the law in ways that determine the formation of legal truths.[115] The relationship between judges and the previous and new establishment is likely to affect how the legal truth is constructed; likewise, as human beings, judges will exercise their discretion informed by their beliefs and opinions. To the extent she sees herself as a 'loyal member of this society', a judge may 'import[…] politics into legal processes and threaten[…] society as [she] perceives it'.[116] This ambivalence is summarised by Robert Cover: on the one hand, we 'hear the judge as a voice of reason [and] see her as the embodiment of principle', but on the other, there is a 'danger in forgetting the limits which are intrinsic to this activity of legal interpretation' and 'in exaggerating the extent to which any interpretation rendered as part of the act of state violence can ever constitute a common and coherent meaning'.[117] This 'institutional structure' allows for the transformation of a judge's understanding of a fact to be transformed into law, conferring 'meaning on the deeds which effect this transformation, thereby legitimating them as "lawful"'.[118] Judges, however, may be reluctant to play a transformative role in TJ for a variety of reasons. In that sense, Hakeem Yusuf expresses regret when the judiciary makes no effort to ensure 'justice for victims of gross human rights violations through an affirmation of the *right to truth*' for victims in transitional justice.[119] Others have defended the importance of a greater judicial proactivity in ICL in 'finding the material truth' about a certain chain of events'.[120]

In addition to practising legal counsel and judges, scholars may also contribute to the formation of the legal truth. For instance, as noted by Alan Freeman, critiques may 'reveal truth' and critical lawyers 'eventually reveal(s) a world which is characterised more by conflict than by harmony, and by patterns of illegitimate hierarchy'.[121] By the same token, scholars may instead be mouthpieces of ruling elites before and after the transition, coerced into adhering to its illiberal values to retain an income, or even choosing to pay lip service

---

[114] Kieran McEvoy, 'What Did the Lawyers Do During the 'War'? Neutrality, Conflict and the Culture of Quietism', (2011) 74(3) *Modern Law Review*, 350; 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 24(4) *Journal of Law and Society* 411. In the latter article, McEvoy draws on the work of Judith N Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press 1964)

[115] For a critical overview of the role of the judiciary with reference to transitional Chile, see Lisa Hilbink, *Judges beyond politics in democracy and dictatorship: Lessons from Chile* (CUP 2007)

[116] On this point see for instance Walter Otto Weyrauch, 'Law as Mask-Legal Ritual and Relevance' (1978) 66(4) *California Law Review*, 699, 708 et seq

[117] Robert Cover, 'Violence and the Word', (1986) 95 *Yale Law Journal* 1601, 1628

[118] Ibid, 1619

[119] Hakeem O Yusuf, 'The Judiciary and Constitutionalism in Transitions', 3. By way of example of judicial behaviour, Yusuf reports how given an "entrenched judicial tradition of plain-fact jurisprudence", in the *Oputa Panel* Case the court "accorded primacy to protecting the federal character of the Nigerian polity over the rights of victims of gross violations of human rights", 6, 13 also discussing the *Oputa Panel* case in Nigeria

[120] Michael Bohlander, 'Paradise postponed? For a judge-led generic model of international criminal procedure and an end to draft-as-you-go' (2014) *Netherlands Yearbook of International Law* 45

[121] Alan D. Freeman, 'Truth and Mystification in Legal Scholarship', (1981) 90(5) *Yale Law Journal* 1229, 1230 et seq

to authoritarian regimes in order to continue public intellectual activities in universities.[122] Their role, therefore, may be advantageous to or destructive of the legal truth, and its proximity to history, depending on factors such as political and ideological alliances as well as agency in practical transitional mechanisms.

In sum, the notion of legal truth is separate from factual truth, but it plays an important role in setting down a historical record about past abuse and in legitimising it in official/legal language. This truth is capable of being 'recycled' across a system as well as constituting the foundation for radical institutional reforms based on an accepted set of sometimes competing narratives in the context of shifting politics and adjustments to power structures, potentially providing rules for contestation of different accounts. In that regard, the legal truth is both an instrument of power as well as a constitutive force in itself, as it both codifies and transforms existing consensus and shapes narratives about past violence. The legal truth may misrepresent facts and conceal structural forms of violence that permeate transitional societies; distortions are determined by politics as well as by procedures of specific mechanisms. Moreover, the actors that shape the formation of the legal truth, including national elites (both pre and post-transition), international organisations involved in setting up truth-finding mechanisms and the lawyers that operate the process, all contribute to the contours of the resulting accounts of the past. Against this backdrop, some survivors may be marginalised from truth-seeking initiatives. However, as exemplified in Argentina, creative uses of law and regional IHRL instruments have enabled a bottom-up push for the legal truth, resulting in an emergent state's obligation to investigate the past and victims' right to the truth.

[122] On the relationship between scholars and the establishment, see for instance the famous dispute between Italian professors of philosophy Benedetto Croce (an antifascist who drafted the Manifesto of Antifascist Intellectuals of 1 May 1925) and Giovanni Gentile (pro-fascist). Croce (and many other antifascist intellectuals), however, notably signed the 1931 'Giuramento di fedeltà al fascismo', a formal endorsement of Mussolini's regime which enabled him to retain his academic post and thus contribute to public debates from a substantially anti-fascist perspective.

4. Truth-Seeking, Collective Memory and Transitional Justice

The importance given to trials, criminal proceedings and other formal legal mechanisms is striking. Even when local, seemingly informal, transitional justice mechanisms are adopted, the authoritativeness of the outcomes may be comparable to that of an official trial or truth commission. This can be understood in relation to the two processes of decision-making identified by Duncan Kennedy as 'rule application and decision according to purposes, or substantive rationality'.[123] As such, in addition to the normative principles contained in a given legal system, the route through which they are applied by an adjudicatory body is equally relevant. Thus, any given purpose of substantive rationality may be pursued (and even achieved) by multiple rule applications (mechanisms), provided they are recognisable and acceptable in a given community. It follows that in any particular setting there will be a spectrum on which different adjudicatory bodies enjoy differing degrees of acceptance in the community on the basis of both rule applications and substantive rationality.

In transitional justice settings, the need to 'construct collective memory'[124] constitutes one of the main substantive rationality aims. According to Kennedy's theory of legal formality, this could be achieved through a variety of rule applications, which, in the application of transitional justice, would include trials and truth commissions, as well as traditional justice mechanisms. The validity of that collective memory, in essence, will depend not only on the content of the narratives captured, but also on the processes of enquiry, evaluation and decision-making that culminate in the formation of said collective memory. In relation to transitional historical justice, Teitel highlights the 'visible turn to the law, its processes, and framework (…) at a time when the social consensus is otherwise frayed', because the 'law offers a canonical language and established symbols and rituals of passage'.[125]

The rituals associated with the formality of law (rule application/procedure) and the validity of its aims (substantive rationality) contribute to discovering and sketching a collective memory about past abuses.[126] The specific relationship between law and collective memory has also been explored.[127] Mark Osiel has argued that prosecutions influence public discussion, as well as serving traditional punitive aims: 'trials, when effective as public spectacle, stimulate public discussion' and 'indelibly influence collective memory of the events they judge'.[128] Legal storytelling and the 'public presentation of the truth' are 'much more dramatic when done through a trial'.[129] This means that shared accounts of the past emerging from trial proceedings carry a more profound meaning. Osiel suggests that the outcome of such processes are similar to founding myths, upon which societies are built or rebuilt; but these myths may be deeply divisive for society and actually cause further fragmentation in communities.[130]

---

[123] Duncan Kennedy 'Legal formality' (1973) *The Journal of Legal Studies* 351, 355, 364

[124] Teitel, *Transitional Justice*, 116

[125] Ibid

[126] On the term 'collective memory' see *inter alia*: Amos Funkenstein, 'Collective memory and historical consciousness' (1989) *History and Memory* 5; Jan Assmann and John Czaplicka 'Collective memory and cultural identity' (1995) *New German Critique* 125

[127] See *inter alia* Joachim J Savelsberg and Ryan D King 'Law and collective memory' (2007) 3 *Annu Rev Law Soc Sci* 189

[128] Mark Osiel, *Mass Atrocities, Collective Memory, and the Law* (Transaction Publishers 1997), 1 et seq

[129] Ibid, 3 and 15 citing Carlos S Nino, *Radical Evil on Trial* (1996)

[130] Ibid, 19

The links between social cohesion and criminal proceedings reflect two main approaches, one founded on value-based arguments and the other on political negotiations. The former assumes that trials express an existing collective moral consensus on a given matter; the prosecution of wrongdoers, therefore, reaffirms belonging to a community and sharing a set of common values.[131] The latter, instead, takes stock of different perspectives within fragmented communities, where formalised trials allow for deliberation between 'social antagonists' who 'occupy the same society'.[132] Trials – and other forms of adjudication – provide a framework for different narratives and claims to compete in uncovering and apportioning responsibilities about past abuse, but their outcomes remain open to further scrutiny from both a moral and political angle.

4.1 Ritual Performances, Legal Masks and Truth-Seeking

The political and social stage upon which truth-seeking initiatives operate and contrasting voices enter into dialogue brings to light the ritual and performative character of transitional justice, where actors (stakeholders) compete for central roles. For instance, trials have been described as a (theatrical) staging of punishments, a form of a ritual of power.[133] A trial can be understood as 'an arena of speakers and listeners' in which the 'search for truth always proceeds by way of competing attempts to shape and present narratives for particular audiences'.[134] As proposed by Paul Gewirtz, 'thinking about the trial as narrative or story-telling can bring fresh attention to the communicative exchanges central to the trial, directing us to the fact that (…) the form of telling and the setting of listening affect everything, and that telling and listening are complex transactions that jointly create meaning and significance'.[135] In addition to trials, examples of the relationship between performance, theatricality, law and transitional justice have been found in truth commissions, such as the South African TRC.[136] This perspective highlights the performative role of truth-seeking activities beyond the production of the legal truth, where ritual performances of certain actions may help moderate a complex situation of political and social upheaval.

A gradual increase in attention towards transitional justice processes as performances has been identified, taking over from questions of 'truth or falsity of the history produced' through those means.[137] Anne Orford indicates that the 'language of truth' 'can be understood in terms of speech act theory – the idea that particular words or utterances accomplish an act'.[138] Historians working on historical transitional justice have reached similar conclusions; for instance, Berber Bevernage discusses how truth commissions in particular contribute to the 'politics of time', producing important socio-political effects in a performative,

---

[131] Ibid, 22 et seq. See also, in particular, Emile Durkheim, *The Division of Labour in Society* (first published 1893, Simon and Schuster, 2014), 81; and the discussion in Savelsberg and King 'Law and collective memory' and Peter Berger, 'Book Note: Mass Atrocity, Collective Memory, and the Law By Mark Osiel, New Brunswick, N.J. and London: Transaction Publishers, 1997 (1998) 34 *Stan J Intl L* 207

[132] Ibid, 22-3, 36 et seq, 43 et seq

[133] Osiel, *Mass Atrocities, Collective Memory, and the Law*, 44, citing David Garland, *Punishment and Modern Society* (OUP 1990), 67

[134] Paul Gewirtz, 'Victims and Voyeurs at the Criminal Trial' (1995-1996) 90 *Nw U L Rev* 863, 865

[135] Ibid

[136] See *inter alia*: Catherine M Cole, 'Performance, Transitional Justice, and the Law: South Africa's Truth and Reconciliation Commission' (2007) 59 *Theatre Journal* 167

[137] Anne Orford, 'Commissioning the Truth', (2006) 15 *Colum J Gender & L* 851, 854 et seq. Orford draws on the work of JL Austin, *How To Do Things With Words* (1962)

[138] Ibid, 855

and not merely descriptive, fashion.[139] As such, the effect of establishing formal truth-seeking mechanisms – regardless of their ability to ultimately achieve their proposed aims within a reasonable timeframe – is in itself noteworthy. For example, it has been argued that the lengthy process of arresting and prosecuting an alleged perpetrator of an international crime by the ICTY may in effect contribute to the accuracy of justice.[140] Moreover, the very fact that an individual is indicted before an international court for some of the most serious abuses contemplated on the international legal stage may send a powerful message in the interim to communities affected. More generally, the rituals associated with formal processes employed as part of transitional justice carry a distinctive force in attempting to agree on past truths.

The performative role of judicial and semi-judicial processes – including trials and truth commissions – contributes to the understanding of formal justice mechanisms as rituals and of their outcomes (i.e. the legal truths) as products of that ritual. As such, the ritual force of processes may be found in formal as well as in traditional mechanisms to uncover the truth. Recognising that 'many norms and political/legal practices are produced by and grounded in ritualized activity'[141] explains why formal procedures (not necessarily trials) are chosen for official truth-seeking purposes. Indeed, it has been acknowledged that 'secular rituals' impact our society.[142] Andrew Cappel defines ritual as 'the performance of a more or less invariant sequence of formal acts and utterances not entirely encoded by the performer', and identifies eight typifying characteristics: formal, invariant, governed by rules, symbolic, sacred, traditional, performed and not encoded by the performer.[143] He notes how:

> Ritualization thus tends to insulate a normative order from the ordinary give and take of everyday life, by locating it instead in the realm of implicit, timeless reality. By doing so, ritual promotes the stability of these orders against too rapid change, and also against gradual deterioration as more and more people choose to violate a norm.[144]

He continues by linking formal (i.e. positive) law to the notion of secular rituals, which 'will become more stable and hence more unquestionable the closer they can be associated through ritualization with such an aura of sacredness', gaining 'a transcendent legitimacy coming from outside human society itself'.[145] Similarly, Weyrauch also points out that 'participants and observers of a legal system are less likely to criticize or even question decisions that appear to be based on an objective application of neutral laws', satisfying a 'quasi-religious faith' in the 'objectivity, neutrality and fairness' of the legal process.[146] In relation to finding the truth through formal procedures in the context of transitional justice, it may be argued that a truth originating from a recognised (and accepted) secular ritual – such as a judicial procedure – is of higher procedural 'pedigree' than an informal or unstructured attempt to discover and agree upon the truth.

---

[139] Berber Bevernage, *History, Memory and State-Sponsored Violence* (Routledge 2012)

[140] Alex Whiting, 'In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered' (2009) 50(2) *Harvard International Law Journal* 323

[141] Andrew J Cappel, 'Bridging Cultural Practice into Law: Ritual and Social Norms Jurisprudence' (2002-2003) 43 *Santa Clara Law Review* 389, 390

[142] Ibid citing Sally F Moore and Barbara G Myerhoff (eds), *Secular Ritual* (Van Gorcum, Assen 1977)

[143]Ibid, 408 et seq, citing Roy A Rappaport, *Ritual and Religion in the Making of Humanity* (CUP 1999)

[144] Ibid, 448

[145] Ibid, 454

[146] Weyrauch, 'Law as Mask-Legal Ritual and Relevance', 717 et seq

The 'Law' as an abstract concept carries the intrinsic potential of embodying the desirable substance and procedure of justice, regardless of its misuse by previous regimes. Thus, ritualisation preserves certain norms 'in a relatively immutable manner'.[147] Consequently, certain normative principles may acquire primacy through the rituals of transitional mechanisms like trials and truth commissions, and become founding concepts of the post-transitional order. This echoes Weyrauch's idea that law involves 'rendering peace and to some extent ordering social interactions', a function which 'necessitates the development of legal rules, which inevitably become legal masks'.[148]

Secular rituals, however, are to be broadly understood beyond ordinary state-administered processes. Anthropologist Kimberly Theidon provides an interesting example of how 'communities also mobilize the ritual and symbolic elements of these transitional processes to deal with the deep cleavages left – or accentuated – by civil conflicts'.[149] In relation to the Peruvian transition, she notes that:

> A central tenet of transitional justice is that it includes important performative aspects; via the secular rituals embodied in transitional legal practices, collectives engage in "ritual purification" and the reestablishment of group unity. From this perspective, law is not just a set of procedures but also a set of secular rituals that make a break with the past and mark the beginning of a new moral community.[150]

Local informal mechanisms presenting ritual characteristics must be handled with care, as argued by Lars Waldorf with reference to the *gacaca* in Rwanda.[151] There may even be a risk that appropriation of local mechanisms by state authorities may create 'state imposed 'informalism' designed to expand the state's reach into local communities', which may consequently result in 'increased formalism, decreased popular participation, and increased state coercion'.[152] Indeed, the ownership of the justice process – be it a formal trial or a local justice mechanism – may itself mask patterns of political domination of one group over another, sometimes confirming or reversing the power dynamics at the time of abuse. With reference to truth-seeking, as noted in the previous section, power structures can distort the effects of rituals, reinforcing unfairness and violence. Ritualised legal procedures, in fact, may conceal other interests.

The analogy of law as a mask furthers our understanding of judicial rituals as social functions of the law.[153] Weyrauch draws convincing parallels between 'the modern social functions of law and those of masks in earlier societies': official procedures carry the 'potential to dehumanize persons through the use of conceptual legal masks', camouflaging the 'human significance' and gravity of certain acts through the illusion that 'legal reasoning will remain on a level of neutral abstraction'.[154] In the theatrics of ritual performance, masks ensure that the show goes on as planned, but may hide the true human emotions behind

---

[147] Cappel, 'Bridging Cultural Practice into Law', 479

[148] Weyrauch, 'Law as Mask-Legal Ritual and Relevance', 723 et seq

[149] Kimberly Theidon, 'Justice in Transition: The Micropolitics of Reconciliation in Postwar Peru' (2006) 50 *Journal of Conflict Resolution* 433, 436

[150] Ibid

[151] Lars Waldorf, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice' (2006) 79 *Temp L Rev* 1, 6

[152] Ibid, 9

[153] Weyrauch, 'Law as Mask: Legal Ritual and Relevance' discussing John T Noonan, *Persons and the Masks of the Law: Cardozo, Holmes, Jefferson and Wythe as Makers of the Masks* (University of California Press 1976)

[154] Weyrauch, 'Law as Mask-Legal Ritual and Relevance', 699 et seq

the act. This difficulty is exemplified in the formal actions carried out in courtroom proceedings by the legal counsel of dictators, when abuse and violence has been widely recognised extrajudicially but not by a tribunal, rendering the defendant (rightly) innocent until proven otherwise. Legal procedures and necessary fair trial guarantees, therefore, sometimes mask the true feelings of horror when faced with unfathomable human evil.[155]

In addition to concealing human emotion, the stakeholders of a formal process will select and highlight certain elements or facts over others, reflecting 'the prevailing value judgments of the society in which they live[d]', giving relevance to certain issues over others.[156] These considerations take on a deeper meaning in times of political flux (such as in the context of transitional justice) when 'any attempt to introduce "irrelevant" matters into legal proceedings involves a challenge, sometimes subtly so, to the established values as protected by rules of law'.[157] Thus, the choice of facts to be included in judicial proceedings in the context of transitional justice highlights the power of discretion that stakeholders of the process have in determining ritualised truth-seeking activities.

For example the BICI report on Bahrain, a non-transitional country which faced an intense period of internal violence in 2011 set out a truth inquiry, independent and yet sanctioned by the authorities, set out to discover factual evidence and evaluate it under international law.[158] However, the failure at government level to implement the BICI recommendations[159] indicates the ritualistic, theatrical character of the whole procedure based on international law, which was not met by substantive responses by the authorities. Thus, by placing excessively high expectations on the law (in the Bahraini case, on the findings and existence of the BICI report, collated and analysed by eminent international jurists) a critical approach to the legal process is lost, and with that comes the realisation that law masks politics.

In essence, truth-seeking initiatives of transitional justice contribute to the formation of collective memory of past abuse through the formalities of recognisable substantive and procedural rules. Indeed, in transitional settings, law provides a set of established rituals that communities recognise as authoritative in guiding historical transitional justice processes, laying the foundations for reconstructing the future social order. In the transitional phase as well as the new system, opposing narratives must coexist and shared rules help regulate these contradictions. The political and social context in which truth-seeking initiatives operate brings to light the ritual and performative character of transitional justice mechanisms such as trials and truth commissions. Against that backdrop, formal (i.e. positive) law assumes a sacred aura that strengthens its legitimacy in guiding truth-seeking rituals. The force of these secular rituals may also extend beyond ordinary state-administered processes, encompassing local informal mechanisms which display a comparable ritual character within a given community. However, it is important to note that law – and by extension, local

---

[155] In general, Hannah Arendt, *Eichmann in Jerusalem* (Penguin 1963)

[156] Weyrauch, 'Law as Mask-Legal Ritual and Relevance', 708 et seq

[157] Ibid, 710, fn 40, discussing Fidel Castro's assertions before the prevailing Cuban judiciary as quoted in Berman, 'The Cuban Popular Tribunals' (1969) 69 *Columbia Law Review* 1317

[158] For the text of the report and related documents, see http://www.bici.org.bh/ [accessed 18 April 2013]

[159] See, for instance, the reports by the Bahrain Center for Human Rights on how a recent Supreme Court of Appeal case presented serious inconsistencies with the findings and recommendations of the BICI report and put into question the independence of the judiciary from the government; available at http://www.bahrainrights.org/en/node/5587 [accessed 18 April 2013]

norms – may mask the substance of truth-seeking and distort the interpretation of past abuse. This shortcoming may be further exacerbated by the structural inequalities directly or indirectly promoted by powerful stakeholders of the process. To counter the risk of marginalising victims from truth-seeking ritual performances and to oppose the pitfalls of using the law as a mask, the developing right to the truth (discussed in chapter 3) can empower survivors to instigate investigations into past harm suffered.

5. Conclusions

This chapter presented the notion of truth as the cornerstone of transitional justice, understood broadly as an objective in itself and as a facilitator for other aims of transition. In its backward-looking guise, truth-seeking aims at discovering facts, though it is unlikely to faithfully represent a historical account of violence. In its forward-looking intent, the truth is inherently presentist, interpreting the past from the current standpoint and in view of long-term societal reform based on normative principles that (partly) break with the past. Given how competing narratives clash in historical TJ, the truths resulting from transitional mechanisms do not reflect the full range of standpoints, and consequently established versions of the past remain open to challenges.

Cognisant of the effects for societies at large of the legal truth produced in trials and truth commissions, this discussion highlights how the legal truth both codifies and transforms the dominant consensus on histories of past abuse and how it may provide some scope to counter prevailing narratives. But substantive and procedural rules may mask the substance of truth-seeking and distort the interpretation of past abuse; likewise, powerful stakeholders of these processes may deliberately perpetuate structural inequalities through the law. As legal truth is the production of legal rituals, comparable to religious rituals, law assumes a sacred aura in guiding truth-seeking mechanisms – and the norms of local unofficial systems of justice may play a similar role. For these reasons, it is important for all types of truth-seeking initiatives in TJ to be understood in their local context yet still from a critical angle.

Structural social, economic and political inequalities before, during and after the political shifts tend to deform TJ processes and the resulting historical accounts by marginalising the agency of victims whose voices have little chance of shaping policy. The exclusion of survivors – whoever they may be – produces two risks: firstly, the truths uncovered about past abuses will be incomplete and inadequate, resulting in severely deficient historical accounts and thus severely affect further transitional aims (such as institutional and legal reforms); secondly, direct and indirect victims may suffer additional dispossession and violence due to their exclusion from public debate about previous harm with a view to social reconstruction. For these reasons, the involvement of survivors in transitional justice processes is crucial: but how can essentially top-down practices of TJ dominated by elites at local, national and international level make room and hear victims' voices as well as giving their accounts some form of legal effect?

In order to counter the risk of marginalising victims from truth-seeking initiatives, a bottom-up push for the legal truth may redress this unequal access to shaping the accounts of past abuse and facilitate reconciliation. In the context of TJ, creative uses of IHRL instruments in Latin America and Europe point to an emerging right to the truth, which carries the radical potential to empower survivors in instigating inquiries into past harm suffered at individual and collective level as well as the related state obligation to investigate abuse. By the same token, survivors may choose to rely on local justice as well as (or instead of) on international law to guide truth-seeking initiatives and other TJ mechanisms. The relocation of TJ from international law to local settings reflects the substantive and procedural rules that guide truth-seeking mechanisms. As both global and local norms help uncover truths, this would indicate an overlap in their objectives. The next chapter considers the development of new truth-seeking tools under international law, and subsequent chapters investigate how local justice – and in particular Islamic law – can contribute to transitional aims.

III. Reassessing the Right to the Truth in International Law

1. Introduction

The labyrinth of rules applicable to transitional justice is likely to disorient survivors who are not leading stakeholders of the process. Hindering their participation affects the process of uncovering legal truths as well as the formation of collective memories. As argued in the first chapter, the paradigm of IHRL may offer a palliative for this problem in the transformative context of TJ, paving the way for a longer-lasting post-transitional idea of inclusive citizenship to contrast new expressions of authoritarianism and conflict. Taking advantage of the possibilities of human rights, survivors of past abuse may be able to access justice and shape historical narratives through IHRL instruments, thus reaffirming a sense of active citizenship and renegotiating the relationship between individuals and state authorities.

The right to the truth appears to be on an upward trajectory in international law and today this concept is widely discussed in relation to TJ.[1] At a broader level, the right to the truth carries the potential of becoming a powerful tool for enabling not only individual victims of serious violations but also societies at large to uncover facts and responsibilities surrounding past abuse, especially when authorities fail to investigate appropriately. The gradual recognition of the right to the truth is evidenced in the Inter-American Human Rights system (IACHR) and the acknowledgment by the Grand Chamber of the European Court of Human Rights (the Court) in the recent *El-Masri v FYRM* (*El-Masri*[2]) judgment. This comparative appraisal calls for a reassessment of this right in global IHRL.[3]

This chapter explores the extent to which recent developments contribute to the establishment of the right to the truth in international law. The first part will introduce this emerging right through the analysis of global and regional sources, after briefly considering its normative value and desirability. The following part will discuss the right to the truth as presented in the *El-Masri* judgment and concurring opinions; in particular, it will take into account the Grand Chamber division on the existence and content of a separate right, as well as the breadth of the category of victims. The final part will then contextualise the significance of citing the right to the truth in *El-Masri* with regards to the European Convention of Human Rights (ECHR), global IHRL and general public international law (PIL). Specifically, the final section considers whether the Court's

---

[1] See, *inter alia*: the right to the truth in relation to truth commissions, Priscilla B Hayner, *Unspeakable truths: Transitional justice and the challenge of truth commissions* (Routledge 2010), 23 et seq; Laura A Young and Rosalyn Park, 'Engaging Diasporas in Truth Commissions: Lessons from the Liberia Truth and Reconciliation Commission Diaspora Project' (2009) 3 *IJTJ* 341; in relation to reparations, Christian Tomuschat 'Darfur—Compensation for the Victims' (2005) 3 *JICJ* 579, who summarily describes it as a 'right evolved in Latin-American countries ('*derecho a la verdad*') after they had emerged from military dictatorships' (581); on the trade-off between truth and formal justice, Iolanda Jaquemet, 'Fighting Amnesia: Ways to Uncover the Truth about Lebanon's Missing' (2009) 3 *IJTJ* 69; Juan E Méndez and Javier Mariezcurrena, 'Accountability for Past Human Rights Violations: Contributions of the Inter-American Organs of Protection' (1999) 26 *Social Justice* (Special Edition on Shadows of State Terrorism: Impunity in Latin America, by Patrice McSherry and Raúl Molina, eds) 78, 84-106; Juan E Méndez, 'Accountability for Past Abuses' (1997) 19 *HRQ* 255

[2] *El-Masri v FYRM,* App. No. 39630/09 (ECHR, 13 December 2012), para 191; and Joint concurring opinion of judges Tulkens, Spielmann, Sicilianos and Keller, and Joint concurring opinion of judges Casadevall and Lopez Guerra, *El-Masri v FYRM*. For an overview of the case content and history see, *inter alia*, Christina M Cerna, 'El-Masri v. The Former Yugoslav Republic of Macedonia (Eur. Ct. H.R.), Introductory Note' (2013) 52 *ILM* 558; and for a background, Peter Wilkitzki, 'German Government Not Obliged to Seek Extradition of CIA Agents for 'Extraordinary Rendition': Comments on the El-Masri Judgment of the Cologne Administrative Court', (2011) 9 *JICJ* 1117; Federico Fabbrini, 'The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism' (2014) 14(1) *HRLR* 85

[3] For an introduction to how comparative law supplements international law, see LC Green, 'Comparative law as a 'source' of international law' (1967-1968) 42 *Tulane Law Review* 52

jurisprudence in light of *El-Masri* contributes to the formation of a global right to the truth as customary international law (CIL) or as a general principle of law. Building on the findings of chapter 2, it provides an example of how courts and judges contribute to the formation of legal truths by establishing a procedural and substantive right to the truth in the context of TJ. In the broader context of the research questions, this chapter explores the right to the truth as it gains traction in the international paradigm of TJ through PIL, setting the scene for understanding how this idea may operate in Muslim-majority legal settings.

2. The Development of a Human Right to the Truth

Acknowledging and tracing the development of the right to the truth requires a preliminary reflection on the proliferation of human rights in general and in transitions. The list of human rights is essentially open-ended and incremental.[4] Human rights seek to protect individuals and groups, reflecting 'the broader goal of states to establish orderly and enlightened international and national legal orders'.[5]

Notwithstanding the presumably laudable intent of human rights developments, critical scholars have explored some underlying problems.[6] Rights discourse may bear unintended consequences, such as further suffering,[7] or conceal a systemic 'planned misery', in which 'human rights emerged as a set of 'blinders' that narrow our field of vision and prevent us from seeing (and hence from challenging) the wider scene'.[8] Referring to the previous chapter, the normative function of human rights reveals how law may operate as a mask. Some critical legal scholars have even warned against human rights 'romance' (suggesting instead a 'register of tragedy');[9] political theorists have expressed similar worries.[10]

The dangers of over-proliferation of human rights have been widely discussed. Often presented as a contemporary ideology,[11] human rights face inflation and as a consequence may gradually lose their 'distinctive moral force'.[12] Upendra Baxi questions whether the 'talismanic properties of human rights enunciations' impact on their quality and efficiency.[13] His main concerns are: (1) the 'question of management of proliferation, vital to the credibility of the enterprise of rights creation entrepreneurship, especially in the conversion of human needs into human rights'; and (2) the 'constant conversion of needs into rights [which] assumes that the rights regime is the principal mechanism for arranging human well-being'.[14] He also questions whether this 'endless normativity' performs 'any useful function in the "real" world'.[15] The analysis of the 'criteria to determine when the concept of "human rights" is being correctly used and when it is being overextended' ultimately raises philosophical questions, argues Susan Marks.[16] Moreover, in order to translate human rights into social realities they must be acknowledged as inherently

---

[4] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Third Edition, Clarendon Press 1989), 99

[5] Ibid

[6] For a recent sample of critiques, see, *inter alia*, David Kennedy, 'The International Human Rights Regime: Still Part of the Problem?' in Rob Dickinson, Elena Katselli, Colin Murray and Ole W. Pedersen (eds) *Examining Critical Perspectives on Human Rights* (CUP 2013), drawing on his earlier piece 'The International Human Rights Movement: Part of the Problem?' (2001) 3 *EHRLR*, reprinted in (2002) 14 *HHRJ* 101. For a discussion of two of the main critical approaches, see Eva Brems, 'Enemies or allies? Feminism and cultural relativism as dissident voices in human rights discourse' (1997) 19 *HRQ* 136

[7] Kennedy, 'International Human Rights Movement'

[8] Susan Marks, 'Human Rights and Root Causes' (2011) 74 *MLR* 57

[9] Susan Marks, 'Human rights in disastrous times', in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012)

[10] Inter alia, Norberto Bobbio, *L'età dei diritti* (Einaudi 1990); Slavoj Žižek, 'Against human rights' (2005) 34 *New Left Review* 115

[11] See, *inter alia*, Makau W Mutua, 'The Ideology of Human Rights' (1996) 36 *VaJIL* 589

[12] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007), 129

[13] Upendra Baxi, 'Too many, or too few, human rights?' (2001) 1 *HRLR* 1

[14] Ibid 5

[15] Baxi 'Too many, or too few, human rights?' 6

[16] Marks 'Human rights in disastrous times' 316, citing James Griffin, *On Human Rights* (OUP 2008)

political.[17] Thus, the creation of new rights essentially reflects a policy decision to recognise, protect and promote an additional value or principle in the complex socio-legal relationship between individuals and the state.

However, the unquestioned acceptance of the state as guardian of human rights may conceal justificatory arguments for abuse by state authorities.[18] In state-centric systems, established human rights categories qualify victims of certain violations as rights-holders and exclude others, reinforcing social hierarchies and generally allowing non-state actors to escape responsibility.[19] Baxi contends that the 'bureaucratisation of human rights' and the language adopted 'enhances the power of the State against violations of human rights in civil society', which hinders their application.[20] He is echoed by Marks who sees the combination of 'so many tests, institutions and procedures' with vagueness and weak enforcement mechanisms as a hindrance to the 'efficacy and coherence of the system as a whole', which in turn widens 'the scope for confusion, inefficiency and empire-building'.[21]

In relation to the right to the truth, existing laws may (deliberately or not) include and privilege some victim groups over others; this further disempowers the marginalised and reasserts state power.[22] In light of Baxi's analysis, the desirability of the right to the truth as a new human right can be tested according to whether it performs a 'useful function in the real world', and, relatedly, whether it empowers citizens as rights-bearers against state authority. Shifting the focus to TJ, the right to the truth may partly rectify the exclusion of certain voices from the dominant narratives of the past, providing actionable means to instigate inquiries. As discussed in the previous chapter, legal truths are inherently permeable to uneven power structures that impact the course of truth-seeking initiatives such as trials and truth commissions. But by introducing the right to the truth, victims and survivors may acquire the ability to challenge the establishment's version of history and compel the authorities to investigate and make public a more contested account of the past. Thus, the relationship between the 'right' and the 'truth' describes the actionability of a process of cause and effect, in which the 'right' exercised by individuals specifically pursues the 'truth' (in the form of legal truth). The key novelty introduced by giving victims a justiciable right is their greater empowerment in the legal system, which in turn facilitates the inclusion of their perspectives in truth-seeking initiatives, as well as providing the option of instigating proceedings. Moreover, far from being restricted to *inter partes* effects, the legal truths derived through the right to the truth also contribute to building the collective memory of the past as part of historical transitional justice processes.

The right to the truth is a means for survivors to confront authorities about past abuses through trials, truth commissions and fact-finding missions at domestic, regional and international level. Drawing on J.L. Austin's theory of 'performative utterances', the right to the truth may fulfil the requirements of self-

---

[17] Ibid 317 *et seq*, referencing Chidi Odinkalu, 'Why more Africans don't use human rights language' (1999) 2 *Human Rights Dialogue*

[18] Ibid 319 et seq

[19] Ibid 317 et seq

[20] Baxi 'Too many, or too few, human rights?' 6

[21] Marks 'Human rights in disastrous times' 312

[22] See Colm Campbell and Catherine Turner, 'Utopia and the doubters: truth, transition and the law' (2008) 28 *Legal Studies* 374, 376 et seq

performativity.[23] As discussed in the previous chapter, talking about the truth may actually contribute to constructing the truth; likewise, talking about the right to the truth may in essence create a new right in TJ settings (and beyond).

2.1 The Foundations of the Right to the Truth

In 2010 the General Assembly established the international day for the right to the truth, confirming acceptance of this right in the UN system.[24] Its slow recognition and uneven applications across the world, however, call for an inquiry into how it developed in order to evaluate its current and future value for TJ. Although it falls short of a general treaty source, if the right to the truth can be framed as CIL or as a general principle of law, its theoretical benefits are likelier to find practical applications in transitional contexts.

The origins of the right to the truth can be traced to IHL. For instance, article 32 of the Additional Protocol I to the Geneva Conventions refers expressly to the 'right of families to know the fate of their relatives', both with respect to the remains of the deceased (Article 34) and for missing persons (Article 33).[25] But as noted in the first chapter of this thesis, relying on IHL does not encompass the full range of TJ situations nor provides easily justiciable rights for individuals.

With regards to ICL, the Rome Statute of the ICC provides only a 'limited realisation' of the right to the truth, restricted to the 'context of enforced disappearances (see Article 7(1)(i))'.[26] Although, in principle, the Rome Statute could accommodate the right to the truth, the costly and largely ineffective victim participation schemes[27] suggest that international criminal justice is not yet ripe for operationalising the victims' right to the truth.

Today, the right to the truth is most closely related to IHRL. It is framed as a right 'in relation to other fundamental human rights by human rights bodies and courts' and referred to as such in truth-seeking mechanisms.[28] Yasmin Naqvi argues that the right to the truth is emerging as 'something approaching a customary right' under CIL;[29] similarly, it could be understood as a general principle of law (both discussed in the final section of this chapter). At UN level the emergence of this right is being channelled and developed through the work of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, whose 2013 report[30] clearly states that the right to the truth is 'enshrined in a

---

[23] John Langshaw Austin, *How to Do Things with Words: The William James Lectures delivered in Harvard University in 1955* (OUP 1962)

[24] UNGA Res 65/196, 'Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims' (21 December 2010) UN Doc A/RES/65/196

[25] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977) 1125 UNTS 3

[26] H Davis & M Klinkner, 'A Victim's Right to Truth and the ICC' (2013), available at http://www.nuffieldfoundation.org/victims-right-truth-and-icc [accessed 12 January 2015], 10

[27] Ibid, citing C Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2012) 44 *Case Western Reserve Journal of International Law*, 475

[28] Yasmin Naqvi, 'The right to truth in international law, fact or fiction?' (2006) 88 *IRRC* 245, 267

[29] Ibid

[30] UNHRC, Twenty-fourth session, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff' (28 August 2013) UN Doc A/HRC/24/42. Human Rights Council resolutions A/HRC/RES/18/7 of 29 September 2011 and A/HRC/RES/27/3 of 25 September 2014 set out the mandate of the (first) Special Rapporteur, appointed 1 May 2012, to deal with situations in which there have been gross violations of human rights and serious violations of international humanitarian law

number of international instruments'.[31] The report affirms that states are required to 'establish institutions, mechanisms and procedures that are enabled to lead to the revelation of the truth', described as 'a process to seek information and facts about what has actually taken place, to contribute to the fight against impunity, to the reinstatement of the rule of law, and ultimately to reconciliation'.[32]

Among the sources listed in that report, the only treaty provision enshrining the right to the truth is Article 24(2) of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CED):

> Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.

The right to the truth, however, extends beyond the specific instance of disappearance, and both the UN Commission on Human Rights and the Human Rights Council have addressed the topic.[33] Significantly, the 2005 UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Orentlicher Principles) affirmed that:

> Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. [34]

Moreover, the 2006 Study on the Right to Truth of the Office of the UN High Commissioner for Human Rights confirmed the 'inalienable right to know the truth vis-à-vis gross human rights violations and serious crimes under the international law'.[35] This demonstrates that the right to the truth is not just relevant to enforced disappearances, but also applies to a broader range of IHRL violations and international crimes.

---

[31] Ibid. These are: (1) International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010), 2715 UNTS (CED), art 24(2) (in September 2013, 93 signatories and 40 ratifications); (2) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147; (3) Human Rights Council Resolutions 9/11 on the Right to the Truth, UNHRC Res 9/11 (24 September 2008) 'Right to the truth', UN Doc A/HRC/9/L.12 para 1, and 12/12, UNHRC Res 12/12 (12 October 2009) UN Doc A/HRC/RES/12/12; (4) UN ECOSOC, Commission on Human Rights, Promotion and Protection of Human Rights, 'Study by the Office of the UN High Commissioner for Human Rights on the right to truth' (8 Feb 2006) UN Doc E/CN.4/2006/91; (5) UN Committee against Torture, 'Consideration of reports submitted by States parties under article 19 of the Convention, Concluding observations: Colombia' (4 May 2010), UN Doc CAT/C/COL/CO/4, para 27; (6) UNHRC, 'Report of the Working Group on Enforced or Involuntary Disappearances' (26 Jan 2011) UN Doc A/HRC/16/48: 'The existence of the right to the truth as an autonomous right was acknowledged by the Working Group on Enforced or Involuntary Disappearances (WGEID) in its very first report (E/CN.4/1435, 22 Jan 1981, para 187)'; (7) UNHRC, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (1 Mar 2013) UN Doc A/HRC/22/52, para 23; (8) UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Paraguay' (1 Oct 2007) UN Doc A/HRC/7/3/Add.3, para 82; (9) UNHRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue' (20 Apr 2010) UN Doc A/HRC/14/23, para 34

[32] Ibid, para 20

[33] See UNCHR Res 2005/66 'Right to the Truth' (20 April 2005) UN Doc E/CN.4/RES/2005/66; UNHRC decision 2/105 (27 November 2006); UNHRC Res 9/11 and UNHRC Res 12/12

[34] ECOSOC, Commission on Human Rights, Promotion and Protection of Human Rights, 'Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher' (8 Feb 2005) UN Doc E/CN.4/2005/102/Add.1, Principle 2

[35] OHCHR 'Study on the right to truth'

The link between the victims' right to know and the state's 'general obligations of states to take effective action to combat impunity' was outlined in the 2005 Orentlicher Principles.[36] More recently, the right to the truth has been extended to other, non-transitional situations – such as counterterrorism activities – based on the protection afforded by international law to 'the legal right of the victim and of the public to know the truth' and the 'corresponding obligations on States which can be conveniently gathered together under the rubric of the international law principle of accountability' (applicable to 'all three branches of government').[37] Outlining a corresponding state obligation helps give the right to the truth a degree of justiciability.

Increasingly, the right to the truth is presented as a cross-cutting right, not restricted to a specific context or type of harm. It has been linked to treaty provisions on a variety of substantive violations, including enforced disappearances, torture and other cruel, inhuman or degrading treatment or punishment, freedom of opinion and expression and basic guarantees in the age of counterterrorism. By tracing this right to a correlated state obligation, survivors of past abuse may, at least in principle, instigate inquiries into past violations and thus contribute to shaping historical accounts.

2.2 The Right to the Truth as an Inter-American Human Right

De Greiff states that 'the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights were at the forefront of developing jurisprudence on the right to truth of the victim, his or her next of kin, and the whole of society'.[38] This claim is echoed by former President of the Inter-American Court of Human Rights (IACHR) Antônio Augusto Cançado Trindade, in relation to enforced disappearances.[39] Undoubtedly, the Inter-American system of human rights appears to offer the most advanced recognition of the right to the truth.[40] Indeed, it deals with the truth as a fully justiciable right.[41]

The IACHR has used the right to the truth in transitional contexts to develop new ways of holding states accountable for past institutional abuse and for refusing to investigate political violence. This tool is actionable by direct victims, but its effects are relevant to society as a whole. *Manuel Bolaños* was the first Inter-American Commission (the Commission) case involving the right to the truth about enforced

---

[36] Principles 1 and 4

[37] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (2013), paras 23 and 27

[38] 'Report of the Special Rapporteur on the promotion of truth' (2013) para 19

[39] Antônio Augusto Cançado Trindade, 'Enforced disappearances of persons as a violation of Jus Cogens: The contribution of the jurisprudence of the Inter-American Court of Human Rights' (2012) 81 *Nordic Journal of International Law,* 507

[40] For a background on the inter-American system of human rights, see inter alia: Thomas Buergenthal and Robert Norris, *Protecting human rights in the Americas: selected problems* (NP Engel 1990); Jo M Pasqualucci, 'The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law' (1994/1995) 26 *University of Miami Inter-American Law Review* 297; David J Harris and Stephen Livingstone (Eds), *The inter-American system of human rights* (Clarendon Press 1998)

[41] Juan E Mendez, 'An emerging 'Right to Truth': Latin-American contributions', in Suzanne Karstedt (ed), *Legal Institutions and Collective Memories* (Hart 2009) 54 et seq. See also Eduardo González and Howard Varney (eds), *Truth Seeking: Elements of Creating an Effective Truth Commission* (Brasilia, Amnesty Commission of the Ministry of Justice of Brazil; New York, International Center for Transitional Justice 2013) 5 et seq. Notably, the Special Rapporteur for Freedom of Expression of the Organisation of American States (OAS) has placed the right to truth firmly on her agenda; see for instance the section on the Right to the Truth on the OAS website: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=156&lID=1 [accessed 8 March 2013]

disappearance and the location of remains.[42] The state's failure to 'use all means at its disposal to carry out a serious investigation of violations committed within its jurisdiction to identify those responsible' was among the violations found.[43] In this case, the right to the truth was anchored to article 25 (the Right to Judicial Protection), namely the right of the victim's family to know the fate of their relative. But as stated by the OAS 'the right to the truth has a basis not only in Article 25, but also in Articles 1(1) (Obligation to Respect Rights), 8 (Right to a Fair Trial), and 13 (Freedom of Thought and Expression) of the Convention'.[44]

The Commission has underlined that article 13[45] is crucial to 'delivering' the right to the truth to family members and society as a whole, as opposed to amnesties.[46] Indeed, amnesty laws constitute an obstacle to the right to the truth,[47] understood as a:

> Collective right which allows a society to gain access to information essential to the development of democratic systems, and also an individual right for the relatives of the victims, allowing for a form of reparation, especially in cases where the Amnesty Law is enforced.[48]

The right to the truth of individual victims, their families and society at large are closely connected, as demonstrated in the case of Monsignor Oscar Romero, Archbishop of El Salvador. Here, the Commission found that the state failure to investigate the circumstances of extra-judicial killing constituted a violation of its duty to reveal the truth to both the victim's family and society at large.[49] An investigation:

> Must be undertaken in good faith and must be diligent, exhaustive and impartial and geared to exploring all possible lines of investigation that make it possible to identify the perpetrators of the crime, so that they can be tried and punished.[50]

The Inter-American Court has also given indications as to how investigations ought to be conducted. For example, as stated in *Velásquez Rodríguez*:

> [the investigation] must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.[51]

---

[42] *Bolaños v Ecuador*, Inter-American Commission on Human Rights (September 12, 1995) Case 10.580, Report No 10/95, as discussed by OAS, Right to the Truth, fn [1]

[43] Ibid

[44] Ibid

[45] Art 13(1): 'Everyone has the right to freedom of thought and expression. This right includes *freedom to seek, receive, and impart information* and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice' [emphasis added to illustrate the right to receive information]

[46] OAS, Right to the Truth, fn [2]. A violation of article 13 was found for the first time in *Ignacio Ellacuría v El Salvador*, Inter-American Court of Human Rights (2002) Case 10.488, Report Nº 136/99

[47] *Alfonso René Chanfeau Orayce v Chile*, Inter-American Court of Human Rights (7 April 1998) Cases 11.505 et al, Report No 25/98; in relation to an amnesty law nullifying the recommendations of a Truth Commission, *Lucio Parada Cea, Héctor Joaquín Miranda Marroquín, et al v El Salvador* (January 27 1999) Case 10.480, Report No 1/99

[48] *Lucio Parada Cea et al v El Salvador*

[49] *Monsignor Oscar Arnulfo Romero y Galdámez v El Salvador*, Case 11.481, Report No 37/00 (13 Apr 2000)

[50] Ibid para 80

[51] Ibid at para 79, quoting *Velásquez Rodríguez v Honduras*, Inter-American Court of Human Rights, (Ser C) No 4 (29 Jul 1988), para 177

Velásquez Rodríguez establishes the state duty to investigate human rights violations alongside its duty to prevent them.[52] Likewise, in the more recent case of *Contreras*, the IACHR linked the 'violation of the right to the truth, understood as a violation of the rights contained in Articles 8, 13 and 25 of the Convention' to the state obligation to 'demonstrat[e] that they have taken all the measures at their disposal to prove that the requested information does not exist'.[53]

Contreras also makes clear that 'the right to know the truth has the necessary effect that, in a democratic society, the truth is known about the facts of grave human rights violations', to the extent that:

> Every individual, including the next of kin of the victims of grave human rights violations, has, in accordance with Articles 1(1), 8(1), 25 and, under certain circumstances, Article 13 of the Convention, the right to know the truth, so that they and society as a whole must be informed on what happened.[54]

Therefore, in the inter-American human rights system, while the primary relationship remains that between the individual and the state – expressed through the individual right to the truth held by the victim and their family members and the duty of the state to ensure that the right to the truth is delivered through trials – the state acquires an additional duty to provide the general public and society at large with the truth. A similar issue is raised in late 2012 by the European Court of Human Rights in *El-Masri v FYRM,* discussed in the next section.[55]

Combining the earlier analysis of the foundations of the right to the truth in the UN system with its regional applications in the IACHR, a central emerging theme links victims' right to the truth and the creation of a broader legal truth relevant to society at large. In light of this, state obligations to investigate the past are significant beyond individual cases. In sum, regardless of the scepticism that surrounds the development of a new human right, the recognition of the right to the truth in the UN system and IACHR points to its existence. This reality may further the status of the right to the truth as CIL or as a general principle of law, as discussed subsequently in this chapter. The following sections discuss the extent to which the right to the truth has developed in relation to the ECHR and what this means more generally.

---

[52] On the positive state obligation set out in *Velásquez Rodríguez*, see *inter alia* Naomi Roht Arriaza, 'State responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law', (1990) 78 *California Law Review*, 449, 467 et seq

[53] *Contreras et al v El Salvador*, Inter-American Court of Human Rights (31 August 2011) Nos 12.494, 12.517 and 12.518, paras 5 and 166

[54] Ibid, 170 and 173

[55] *El-Masri v FYRM*, para 191

3. The Right to the Truth and the ECHR

In contrast to the Inter-American jurisdiction, 'the right to truth has been comparatively slow to develop' in the Council of Europe system.[56] An initial acknowledgement came in 2005 when a series of resolutions of the Parliamentary Assembly of the Council of Europe (PACE) culminated in the recognition of the families of disappeared persons as 'independent victims', to be granted a 'right to be informed of the fate of their disappeared relatives'.[57] However, it was only in the *El-Masri* judgment of December 2012 that the European Court of Human Rights (the Court) acknowledged the right to the truth, when the Grand Chamber made its first explicit reference to this right.[58] This case has brought to light the question of the right to the truth in relation to the ECHR, and linked it to the procedural limb of article 3 (prohibition of torture). Most notably, in the concurring opinions, six judges out of seventeen debated the doctrinal point of the right to the truth in relation to the Convention as well as in international law more generally.

Taken together, the *El-Masri* judgment and concurring opinions 'cautiously expand the function of the state duty to undertake a credible investigation', setting 'a novel standard to secure accountability of human rights violations committed in other national security cases and beyond' (e.g. TJ).[59] In assessing the procedural limb of Article 3, and specifically the lack of an effective investigation, the Court noted 'another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case'.[60] Relating the discussion back to the previous chapter of this thesis, the twin principles of substantive rationality and (procedural) rule application identified by Duncan Kennedy must be sufficiently satisfied in order to achieve justice.[61] With reference to the right to the truth in the context of the ECHR, this means that the recognition of its substantive element would be incomplete unless the procedural formalities that render it justiciable (and thus real) are defined and articulated in a manner that enables individuals to access justice and put it into practice.

For the Court, the existence of the right to the truth was linked to the 'right to know what happened'.[62] Consequently, if state authorities carry out an inadequate investigation, the right to the truth may be violated and the state may be in breach of its obligation to protect human rights (and specifically article 3) within its jurisdiction. The state's obligation to protect includes a procedural question (an obligation of means) to demonstrate steps taken to prevent a violation (regardless of whether state action actually results in averting the violation), and a substantive question, to ascertain whether the state's action amounts to 'reasonable measures'.[63] Indeed, an effective (adequate) investigation, according to the Court in *El-Masri*, is 'capable of

---

[56] James A Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (Routledge 2012), 72

[57] Parliamentary Assembly of the Council of Europe (PACE), 'Resolution 1463 on Enforced Disappearances' (2005), cited in Sweeney, *The European Court of Human Rights in the Post-Cold War Era* 72 et seq

[58] *El-Masri v FYRM*, para 191

[59] Fabbrini 'The ECHR, Extraordinary Renditions and the Right to the Truth'

[60] *El-Masri v FYRM*, para 191

[61] Duncan Kennedy 'Legal formality' (1973) *The Journal of Legal Studies* 351, discussed in the previous chapter

[62] *El-Masri v FYRM*, para 191

[63] On this see Olivier De Schutter, *International Human Rights Law* (CUP 2010), 415 et seq, citing, *inter alia*, *E and others v UK*, App no 33218/96 (ECHR, 26 Nov 2002) and *Osman v UK*, App no 23452/94 (ECHR, 28 Oct 1998)

leading to the identification and punishment of those responsible for the alleged events and of establishing the truth'.[64]

Having acknowledged that, in *El-Masri* the Court went on to 'underline the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened'.[65] Moreover, even when 'obstacles or difficulties (…) prevent progress in an investigation', an 'adequate response by the authorities in investigating allegations of serious human rights violations' is 'essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts'.[66] This move calls for a reflection on how the Court approaches new challenges and new rights.

The Court's prerogative to go beyond – or behind – the text of the Convention to identify implied 'unenumerated rights', gives credence to rights 'which are not expressly mentioned in the text but (…) should be "read into" it'.[67] This reflects the Court's view that the ECHR operates as a 'living instrument which (…) must be interpreted in the light of present-day conditions',[68] setting out to guarantee rights that are 'practical and effective', and not 'merely theoretical or illusory'.[69] New developments in IHRL – like the recognition of the right to the truth – fall within the scope of 'present-day conditions' that inform the interpretation of the ECHR as a human rights treaty. As such, the object and purpose of the Convention (i.e. the protection and promotion of human rights) guides its application.[70] The limit to the expansion of the ECHR is imposed when the Court reads 'a significant new obligation into the Convention' which is not an integral part of it.[71] Evolutive interpretation[72] allows the Court to integrate its understanding of the ECHR through practice.[73] This poses similar challenges as any constitutional interpretative approach that departs from black-letter law; judicial proactivity may promote novel interpretations of founding texts bypassing the ordinary (expected) democratic process – or, in the case of PIL treaties, formal accession by states.

The Court has, notably, found implied procedural rights in the Convention. In *Golder*, Article 6 implied a right of access to the courts 'in its context and having regard to the object and purpose of the Convention',

---

[64] *El-Masri v FYRM*, para 193

[65] Ibid, para 191

[66] Ibid, para 192

[67] Letsas, *A Theory of Interpretation of the European Convention,* 61

[68] *Tyrer v UK*, App. no. 5856/72 (ECHR, 25 Apr 1978), 31

[69] Reference in *Airey v Ireland*; and in *Tyrer v UK*, *Klass v Germany* and *Goodwin v UK*, App no 28957/95 (ECHR, 11 Jul 2002) discussed in Luzius Wildhaber, 'The European Convention on Human Rights and International Law' (2007) 56 *ICLQ* 217, 223. See also Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 *HRLR* 57, 60; *Loizidou v Turkey* also discussed in Wildhaber, 221

[70] JG Merrills, *The Development of International Law by the European Court of Human Rights* (2nd ed, Manchester University Press 1993) 69

[71] Ibid 84, 87, citing *Case of Swedish Engine Drivers Union v Sweden*, App no 5614/72 (ECHR, 6 Feb 1976)

[72] Wildhaber, 'The ECHR and International Law', 223. For a discussion of evolutive interpretation see, *inter alia*: Letsas*, A Theory of Interpretation of the European Convention*, 74

[73] *Soering v UK,* and *Cruz Varas and others v Sweden,* App no 15576/89 (ECHR, 20 Mar 1991) in Merrills, *The Development of International Law by the European Court,* 81; 84. See also VCLT Article 31(3)(b) on taking into account 'any subsequent practice in the application of the treaty'

although the text of the article does not expressly state as much.[74] This is because 'one can scarcely conceive of the rule of law without there being the possibility of having access to courts'.[75] Similarly, in *El-Masri* the Court links the right to the truth to the rule of law, through the procedural limb of article 3. Yet a valid objection to admitting implied rights is raised by Merrills: 'if the Court is prepared to imply a right, then it must define it'.[76] By not providing a clear definition of the right to the truth in *El-Masri* the Court proactivity remains vulnerable to criticism; however, this accusation may be dismissed by considering the definitions provided in the global IHRL instruments cited in the judgment as evidence of this right.

The extent to which the Court pushes the boundaries of the text of the Convention to 'read in' new rights may also depend on the judicial ideologies of restraint and activism and whether judges favour 'tough conservativism' or 'benevolent liberalism'.[77] Merrills describes the judicial activist as a judge who 'sees his job as both to apply the law and, where necessary, to make it', considering the judiciary to be 'part of the political process and adjudication [as] always a political act'.[78] But in doing so, the Court's creativity must strike 'a fair balance between judicial innovation and respect for the ultimate policy-making role of member States'.[79] Even in TJ, as discussed in chapter 2, the judiciary may find itself performing a constitutive role to construct the legal truth and provide an official account of past abuse, going beyond its merely adjudicatory function. In recognising the right to the truth, the Court would provide an important tool for TJ as well as more generally.

Where an unenumerated right, or a novel (expansive) interpretation of a listed right, is based on global IHRL instruments applicable to the member states in other forums (and especially if supported by ratification, signature, or participation in the *travaux*) the Court would be arguably justified in adopting a strong progressive approach to protection beyond the black letter of the ECHR. With reference to the right to the truth, if the Court finds that a sufficient number of its member states have joined the International Convention for the Protection of All Persons from Enforced Disappearance, contributed or endorsed the drafting of global instruments that recognise this right or funded truth commissions overseas, it may have reason to refer to them. In *El-Masri* it took a step in that direction.

The Court raised two key issues in *El-Masri*: (1) the very existence of the right to the truth, and its relationship to the Convention via article 3; and (2) who are the bearers of the right to the truth, and whether they extend beyond the direct victim of a violation. These questions, however, are brought to light more clearly in the doctrinal disagreements in the Grand Chamber, as evidenced in the concurring opinions, the content of which is discussed in the following paragraphs.

The joint concurring opinion of judges Tulkens, Spielmann, Sicilianos and Keller criticised the judgment's 'certain over-cautiousness' in making a 'somewhat timid allusion to the right to the truth in the context of

---

[74] *Golder v UK,* App no 4451/70 (ECHR, 21 February 1975) para 36, discussed in Merrills *The Development of International Law by the European Court of Human Rights*, 85 and in Letsas, *A Theory of Interpretation of the European Convention*, 61

[75] Ibid, para 32

[76] Merrills *The Development of International Law by the European Court of Human Rights,* 61

[77] Ibid 229, and 230 for a discussion on tough conservativism and benevolent liberalism

[78] Ibid, 232

[79] Mowbray, 'The Creativity of the European Court', 79

Article 3 and the lack of an explicit acknowledgment of this right in relation to Article 13'.[80] These judges linked the right to the truth to Article 13, especially – but not only – when related to procedural obligations under Articles 3, 5 and 8.

For Tulkens *et al*, the reasoning in the judgment should have acknowledged that 'in the absence of any effective remedies (…) the applicant was denied the "right to the truth" that is, the right to an accurate account of the suffering endured and the role of those responsible for that ordeal' (citing *Association 21 December v Romania*[81]). If the right to the truth is understood as encompassing the 'right to ascertain and establish the true facts', it is more appropriately situated within the scope of Article 13, especially in the context of 'scale and seriousness' of the violations at stake and widespread impunity. In that regard, 'the search for the truth is the objective purpose of the obligation to carry out an investigation and the *raison d'être* of the related quality requirements (transparency, diligence, independence, access, disclosure of results and scrutiny)'.

In this concurring opinion, the right to the truth is a 'well-established reality' which is 'far from being either innovative or superfluous'; it is neither 'a novel concept' in the Court's jurisprudence, 'nor is it a new right'. To support their claim, they relied on the Court's own case law, global IHRL instruments,[82] the jurisprudence of the Inter-American human rights system,[83] EU[84] and Council of Europe[85] statements as well as evidence provided by third-party interveners.[86] By remarking on the well-established reality of the right to the truth, Tulkens *et al* acknowledged the scepticism that often greets the introduction of novel concepts through case law. Nonetheless, by stressing that the right to the truth is not a new concept in international law or in the Court's own jurisprudence, they consciously pre-empt possible accusations of introducing additional rights; this suggests that recognition of the right to the truth is not an inflation or over-proliferation of rights, a concern outlined by Baxi and others as discussed earlier.[87]

Conversely, in the other separate concurring opinion in *El-Masri*, Judges Casadevall and Lopez Guerra assert that judges have no place in introducing a right 'different from, or additional to' the provisions set out in the Convention and the Court's case law,[88] dismissing the idea that the right to the truth merits attention either as an extension to provisions within the Convention or as a novel human right. Contrary to Tulkens *et al*, Casadevall *et al* argued that it was not necessary to address the right to the truth 'as something different

---

[80] *El-Masri v FYRM*, Joint concurring opinion of Judges Tulkens *et al*, para 10

[81] *Association 21 December 1989 v Romania*, App no 33810/07 and 18817/08 (ECHR, 24 May 2011)

[82] Specifically, 'Convention on Enforced Disappearances' art 24, para 2; 'Updated Set of Principles for the Protection and Promotion of Human Rights'; UNHRC Res 9/11 and UNHRC Res 12/12

[83] *Velásquez Rodríguez v Honduras* and *Contreras v El Salvador*

[84] EU, 'Council Framework Decision on the standing of victims in criminal proceedings' (15 March 2001) (2001/220/JHA)

[85] Council of Europe, 'Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations', adopted by the Committee of Ministers (30 March 2011) 1110th meeting of the Ministers' Deputies

[86] Including UNHCHR, Redress, Amnesty International and the International Commission of Jurists; see *El-Masri v FYRM*, paras 175-179

[87] Baxi 'Too many, or too few, human rights?', 6

[88] *El-Masri v FYRM*, Joint Concurring Opinion of Judges Casadevall and Lopez Guerra

from, or additional to, the requisites already established in such matters' in previous case law.[89] For them, the right to the truth is equivalent to the right to a serious investigation, a 'serious attempt' to 'finding out the truth of the matter' for which three elements must be established: the facts of the case, the cause of the injuries suffered, and the identity of those responsible.

For Casadevall *et al*, the right to a serious investigation is specifically linked to the deprivation of life (Article 2) and torture, inhuman or degrading treatment (Article 3). Therefore, they suggest that the right to the truth is merely an extension of the procedural obligations under these articles, actionable only by the direct victim. As such, 'a separate analysis of the right to the truth becomes redundant, as do references concerning accountability to the general public.[90]

Avoiding repetition in articulating and extending convention rights echoes another of Baxi's preoccupations: whether a provision performs 'any useful function in the "real" world'.[91] The restrained approach adopted by Casadevall *et al* is consistent with previous case law limiting the Court to considering only concrete issues and not theoretical points; this is because 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[92] In that regard, if the content of the right to the truth can be subsumed within the scope of articles 2 and 3, a move to afford separate recognition, is unnecessary according to their argument.

Despite the more conservative argument, it could still be argued that the right to the truth as an articulation of the procedural obligations of article 3 satisfy Baxi's criteria of usefulness. Firstly, it consolidates an existing and established right in the ECHR (in *El-Masri*, article 3); as such, it would contribute to the enjoyment of a clear substantive right through a stronger procedural norm. Secondly, it enables the Court not only to align its approach to trends in international law, but also to contribute constructively to the development of IHRL, as will be discussed subsequently in this chapter. Ultimately, however, the real test for the usefulness of the right to the truth must turn on the extent to which victims and survivors may use it to further their rights and interests. In other words, this right must be actionable concretely by applicants who survived or were affected by past abuse.

3.1 Victims' Rights to the Truth in a Democratic Society

Persons affected by harm hold an immediate interest in knowing the truth as victims of the violation. From a criminological perspective, the emotional repair of truth-finding contributes to the justification of the right to the truth in TJ.[93] Likewise, 'the restorative nature of truth is as much remedial as it is reparative, as much procedural as substantive, and as much immediate as enduring'.[94] In their concurring opinion in *El-Masri*, Tulkens et al also recognised how the right to the truth is connected to the emotional repair of victims:

---

[89] Ibid

[90] Ibid

[91] Baxi 'Too many, or too few, human rights?', 6

[92] This is the wording used in *Airey v Ireland*, App no. 6289/73 (ECHR, 9 Oct 1979) para 24

[93] See, inter alia, Jonathan Doak, 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions' (2011) 11 *ICLR* 263

[94] Thomas M Antkowiak, 'Truth as Right and Remedy in International Human Rights Experience' (2001-2002) 23 *MichJIL* 977, 1013

> Establishing the true facts and securing an acknowledgment of serious breaches of human rights and humanitarian law constitute forms of redress that are just as important as compensation, and sometimes even more so.[95]

According to the Grand Chamber in *El-Masri*, the 'right to know what happened', which is expressly linked to the right to the truth, is relevant to (a) the victim (applicant), whose Convention rights are allegedly violated and who has standing before the Court; (b) the family of the victim; (c) 'other victims of similar crimes'; and (d) the 'general public'.[96] This broader understanding of the category of victims echoes the jurisprudence of the IACHR discussed previously.

The Court's jurisprudence has confirmed that victim status is relevant at all stages of the proceedings.[97] Victims are presented as a special category in Article 34 of the ECHR[98] and in the *Practical Guide on Admissibility Criteria*.[99] An applicant may be a direct victim if 'directly affected by the act or omission', 'even in the absence of prejudice'.[100] However, 'this criterion cannot be applied in a rigid, mechanical and inflexible way': even if the victim is deceased the case may continue, because 'human rights cases before the Court generally also have a moral dimension', especially 'if the main issue raised by the case transcends the person and the interests of the applicant'.[101] This aspect in particular is highly relevant to the construction of the legal truth discussed in the previous chapter, inasmuch as it presents a public account of the past. It also justifies the inclusion of potential and indirect victims in the category.

In specific circumstances, the Court may also accept applications from potential or indirect victims, i.e. 'persons who could not complain of a direct violation'.[102] These include: individuals affected by the existence of secret measures (such as telephone tapping) 'without having to allege that such measures were in fact applied to [them]';[103] applicants claiming 'that a decision to extradite [them] would, if implemented, be contrary to Article 3' given the 'foreseeable consequences in the requesting country';[104] certain classes of people who 'run a risk of being directly prejudiced by the measure complained of',[105] and those who are 'directly affected by the legislation' if it is 'established that there is a real risk (…), in the not too distant future' requiring a modification of conduct or risk of prosecution.[106]

---

[95] *El-Masri v FYRM*, Joint concurring opinion of judges Tulkens *et al*, para 6

[96] *El-Masri v FYRM*, para 191

[97] *Scordino v Italy (No. 1)*, App no 36813/97 (ECHR, 29 Mar 2006) para 179

[98] 'The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention'

[99] Council of Europe/European Court of Human Rights, 'Practical Guide on Admissibility Criteria' (2011) http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf [accessed 30 September 2013]

[100] *Amuur v France*, App no 19776/92 (ECHR, 25 Jun 1996) para 36, cited in Council of Europe, 'Practical Guide on Admissibility Criteria'

[101] *Karner v Austria*, App no 40016/98 (ECHR, 24 Jul 2003) para 25

[102] Council of Europe, 'Practical Guide on Admissibility Criteria', para 12

[103] *Klass and Others v Germany*, App no 5029/71 (ECHR, 6 Sep 1978), para 34

[104] *Soering v UK*, App no 14038/88 (ECHR, 7 Jul 1989), para 90

[105] *Open Door and Dublin Well Woman v Ireland*, Apps no 14234/88, 14235/88 (ECHR, 29 Oct 1992), para 44

[106] *Burden v UK*, App no 13378/05 (ECHR, 29 Apr 2008), para 33 et seq

The Court can accept applications from family members as indirect victims, 'where there is a personal and specific link between the direct victim and the applicant'.[107] So far, this category has included spouses,[108] parents,[109] and even a nephew with close ties to the direct victim and the violation[110] (but has excluded an adult sibling living in a different city[111]). Nevertheless, it has stated that there is no automatic 'general principle that a family member of a "disappeared person" is thereby a victim of treatment contrary to Article 3'; affording victim status to relatives depends on 'special factors' which give 'the suffering of the applicant a dimension and character distinct from the emotional distress', based on the proximity of familial ties, the circumstances of the relationship and whether the harm was directly witnessed.[112]

Significantly, the 'victimhood' of relatives does not derive vicariously from the status of the direct victim (generally under Articles 2 and 3). Instead, they acquire independent victim status *vis-à-vis* the state in connection to the violations suffered by the direct victim, when the 'authorities' reaction and attitudes to the situation' are inadequate, such as the responses to family members attempting to obtain information.[113] This was confirmed in *Association 21 December 1989 v Romania*,[114] where the Court found that the failure of the state to provide families of the victims with adequate and prompt access to an independent judicial enquiry on brutal political repression contributed to the violation of Article 2.[115] This also reaffirms the state's obligation to provide access to the truth about past abuse through judicial means.

In *Aslakhanova and Others v Russia* (enforced disappearances in Chechnya and Ingushetia) the Court distinguished the state's duty to carry out an effective investigation and conduct a trial (which is not an obligation of result) from the right to the truth granted to victims.[116] It lists the regional and international instruments applicable to enforced disappearance, calling the right to the truth by that name.[117] By linking alleged violations of articles 3 and 5 expressly to the violation of article 2, the Court noted that the 'essence of such a violation does not lie mainly in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention'.[118] This stresses the state's obligations to deliver the right to the truth through its actions, more than the rights of the

---

[107] Council of Europe, 'Practical Guide on Admissibility Criteria', para 30

[108] *McCann and Others v UK*, App no 18984/91 (ECHR, 27 Sep 1995)

[109] *Kurt v Turkey*, App no 15/1997/799/1002 (ECHR, 25 May 1998) para 130-134

[110] *Yaşa v Turkey*, App no 63/1997/847/1054 (ECHR, 2 Sep 1998), para 66

[111] *Çakici v Turkey*, App no 23657/94 (8 Jul 1999), para 98-99

[112] Ibid

[113] Ibid

[114] *Association 21 December v Romania* discussed in Sweeney *The European Court of Human Rights in the Post-Cold War Era* 74 et seq. See also James A Sweeney, 'Restorative Justice and Transitional Justice at the ECHR' (2012) 12 *ICLR* 313, 322

[115] Ibid, paras 142-145; para 143: Or, l'obligation procédurale découlant de l'article 2 de la Convention peut difficilement être considérée comme accomplie lorsque les familles des victimes ou leurs héritiers n'ont pas pu avoir accès à une procédure devant un tribunal indépendant appelé à connaître des faits

[116] *Aslakhanova and Others v Russia*, Apps no 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, (ECHR, 18 Dec 2012), para 130

[117] Ibid, quoting 'PACE Resolution 1463 on Enforced Disappearances'; 'Convention on Enforced Disappearances' (CED); also noting that art 5 CED and art 7 Rome Statute of the International Criminal Court (17 July 1998, entered into force on 1 July 2002) A/CONF.183/9 both describe widespread or systematic practice of enforced disappearance as a crime against humanity

[118] Ibid, para 131

victim/relative to know. This approach is consistent with previous judgments in which the state's persistent failure to account for missing persons constituted a continuing violation of article 3 for relatives.[119]

In *El-Masri* the Grand Chamber partly reconsidered the Court's tendency to talk of the state's breach of the procedural limb of substantive articles (generally 2 and 3) rather than granting an explicit right to the truth to individual victims and their relatives in relation to substantive provisions. Instead, it highlighted that inadequate state investigations impact the right to the truth, opening up the possibility of considering it a stand-alone right.[120] However, the meaning of 'impact' falls short of a 'violation', leaving the matter unresolved. The difficulty in clearly outlining the right to the truth is interconnected with the identification of specific victims who hold that right. Given that harm affects communities widely, the general public may also have an interest in the 'right of access to relevant information about alleged violations' in addition to those directly concerned, extending the right to the truth beyond the parties to a case.[121]

By acknowledging that 'other victims of similar crimes and the general public' may also be affected by inadequate state investigations which have an impact on the right to the truth, the Grand Chamber links this right to the rule of law.[122] When authorities openly violate human rights or guarantee impunity for the abusive behaviour, investigations into serious violations contribute to 'maintaining public confidence' in the rule of law. Previous jurisprudence already found the right to know the truth especially important in situations marred by an unambiguous disregard for the rule of law and 'conditions of guaranteed impunity' for state agents and authorities.[123] Likewise, the Court has stated that authorities cannot remain inactive and allow perpetrators of violent repression against civilians to be shielded from criminal responsibility through statutes of limitations, stressing the importance to know the truth for both direct victims as well as society as a whole.[124] Nevertheless, in *El-Masri* the Grand Chamber did not analyse the broader implications of the right to the truth for the general public and in relation to maintaining public confidence in the rule of law, leaving this task to the separate opinions.

The concurring opinion by Tulkens et al stressed that 'the desire to ascertain the truth plays a part in strengthening confidence in public institutions and hence the rule of law'.[125] Thus, the political significance and implications for society at large of these cases goes beyond the dispute between individual applicant and respondent state. On the other hand, for Casadevall et al it is 'the victim, and not the general public, who is entitled to this right resulting from Article 3 of the Convention', regardless of the general public's interest (and curiosity) in the case.[126] While not dismissing the fact that certain cases carry public significance beyond the parties to the dispute, these judges argued that the interest of society at large should be irrelevant to the Court.

---

[119] *Cyprus v Turkey,* App No 25781/94 (ECHR, 10 May 2001), discussed in Dermot Groome, 'Identifying Synergies between the Right to the Truth and International/Domestic Criminal Law in combating Impunity' (2011) 29 *BerkJIL* 175, 179 et seq

[120] *El-Masri v FYRM*, para 191

[121] *El-Masri v FYRM*, Joint concurring opinion of judges Tulkens *et al*, para 4

[122] *El-Masri v FYRM*, para 191

[123] *Aslakhanova v Russia*, para 231

[124] *Association 21 December v Romania,* paras 142, 144 and 194

[125] *El-Masri v FYRM*, Joint concurring opinion of judges Tulkens *et al*, para 6

[126] Ibid*,* Joint concurring opinion of judges Casadevall and Lopez Guerra

The more conservative approach, however, seems to miss a distinctive feature of the right to the truth revealed by the IACHR. In support of this, Tulkens et al cite *Contreras* (alongside *Velásquez Rodríguez*) where the victim and their relatives had 'the right to know the truth, so that they and society as a whole must be informed on what happened', as there must be knowledge 'about the facts of grave human rights violations' in a democratic society.[127] This echoes the Court's own application of the ECHR as 'an instrument designed to maintain and promote the ideals and values of a democratic society'.[128] Tasked with the political responsibility of defending human rights across Europe, the Court – like all judges in 'modern democracies' – has 'a major role to play in protecting democracy'.[129] This approach consolidates the arguments presented in chapter 2 suggesting that judges have an important function in uncovering legal truths and contributing to the collective memories of past abuse. Therefore, a Court which fails to uphold the victims' right to the truth may be criticised as complicit in protecting perpetrators, which radically undermines the democratic intent of the ECHR. Moreover, the enjoyment of right to the truth contributes to maintaining public confidence in the rule of law and is the basis for public order and democracy, especially in times of transition.

The ECHR is cautiously receptive of the right to the truth. In *El-Masri*, the Grand Chamber expressly acknowledged this right in relation to the procedural limb of Article 3, although judges disagreed on the usefulness of such a right, whether it introduces new rights, and whether society at large has an interest in the truth alongside victims. The discussion at the ECHR on the right to the truth feeds into the broader discussion of the formation of legal truths outlined in previously. In particular, the recognition of the right to the truth points to the related state duty to investigate past abuses, not only in relation to the specific case of one party, but with a view to present an official account of history that society as a whole can access. Moreover, as noted by Tulkens, the uncovering of the truth plays an important part in strengthening the rule of law, indicating a notion of legal truth which is inherently transformative. Thus, the case law of the ECHR suggests a willingness of the Court to acknowledge the function of the right to the truth in societies in transitional settings (*Association 21 December; Aslakhanova*) or in situations of exception (*El-Masri*) where the effects of political and legal uncertainties prevail over the enjoyment of human rights. As such, the victims' right to the truth counters the authorities' unwillingness to account for abuse, providing individual redress as well as informing collective memories, and compels states to investigate human rights violations. In the context of transitional justice, this recognition gives the broad category of victims a (regional) human rights tool to demand a formal state inquiry into the circumstances and responsibilities for past abuse – and not just wait in hope for their suffering to be recognised.

---

[127] *Contreras v El Salvador* 173; 170

[128] See, inter alia, *Soering v UK* and *Klass v Germany*

[129] Aharon Barak, 'Human rights in times of terror – a judicial point of view' (2008) 28 *Legal Studies* 493, 494

4. The Right to the Truth under PIL: ECHR Contributions

The foregoing discussion reveals the Court's receptiveness to global trends in IHRL and suggests it can influence those trends. By acknowledging the right to the truth, the Court joins the IACHR and various UN bodies that had previously done so: the increased consensus around this right acquires significance under CIL, evidenced through *opinio juris* and state practice.[130] Arguably, ECHR jurisprudence carries a significant normative value regionally within its jurisdiction and potentially beyond it.[131] The Court contributes to 'international legal culture' by providing important 'elucidation and development of international law' as well as developing 'principles of general applicability', such as those addressing procedure, jurisdiction and admissibility.[132] Jointly with the IACHR, the ECHR is able to give regional legal effect to many IHRL principles which may otherwise be un-justiciable: for this reason, its importance as a discrete regional mechanism acquires global significance as well. Mindful of the specificities of the European context, this section will focus on the dialogue between the Court, as an example of a regional human rights tribunal, and PIL in shaping the right to the truth as well as (potentially) human rights in general.

To shield itself from criticism, the right to the truth must be grounded in the sources of PIL. To that end, when the Grand Chamber and individual judges considered the right to the truth in *El-Masri,* they contextualised the ECHR among a broader range of IHRL instruments, including UN documents and the IACHR jurisprudence. The difference between the two courts' use of the right to the truth can be explained by the IACHR having to face a regional wave of authoritarianism and amnesties that forced judicial creativity to uncover accounts of past violence. Conversely, the Court has had fewer opportunities to explore this right ECHR, which has surfaced in relation to decommunisation and, more recently, to counter-terror practices. In *El-Masri,* the Court considered the UN Human Rights Council Resolutions 9/11 and 12/12 on Right to the Truth among the relevant sources to get round the lack of an explicit mention of the right to the truth in the ECHR. This move has, arguably, contributed to the creation of CIL.

References to IHRL and PIL in the Court's jurisprudence denote an interactive, reciprocal correlation. The former President of the Court Luzius Wildhaber has remarked that the ECHR and PIL enjoy a 'dynamic and evolutive' relationship, 'checking and building on each other.[133] As 'part of the legal background' of the ECHR (a treaty under PIL[134]), international law is a 'vital reference point' for the Court.[135] The ECHR expressly mentions international law in Article 7, Article 15, Article 35 and Article 1 Protocol I, and the Court's case law has clarified that 'the Convention should so far as possible be interpreted in harmony with

---

[130] CIL has been widely explored, *inter alia*: Josef L Kunz, 'The Nature of Customary International Law' (1953) 47 *AJIL* 662; Anthony D'Amato, 'Trashing Customary International Law' (1987) 81 *AJIL* 101; J Patrick Kelly, 'The Twilight of Customary International Law' (1999-2000) 40 *VaJIL* 449; Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *AJIL* 757, addressing the shift of focus from state practice to *opinio juris*

[131] Eg extraterritorially, see *Al-Skeini v UK*, App no 55721/07 (ECHR, 7 Jul 2011)

[132] Merrills, *The Development of International Law by the European Court*, 252; 17

[133] Wildhaber, 'The ECHR and International Law', 230

[134] Thus, the Vienna Convention on the Law of Treaties of 23 May 1969 applies to its interpretation, as confirmed in *Loizidou v Turkey*, App no 15318/89 (ECHR 18 Dec 1996), para 43, citing, *inter alia*, *Golder v the United Kingdom*, para 29

[135] Merrills, *The Development of International Law by the European Court*, 203 et seq

other rules of international law of which it forms part'.[136] It routinely considers PIL within the applicable legal framework to decide cases,[137] and even references ICJ jurisprudence.[138] By drawing on other international law instruments, the Court develops a reading of the Convention consistent with other areas of IHRL (as was the case in *El-Masri*).[139] And as such, the ECHR plays a 'key role' in IHRL and PIL, which is desirable, argues Wildhaber, 'if it contributes to the evolution of international law at large' as well as of IHRL.[140]

Indeed, the Court has relied on international law to determine 'the effect of some substantive provisions of the Convention' and has been responsive to developments in international law as a means for interpreting and applying it.[141] But the ECHR does not always follow classic state-centric PIL;[142] early case law clarified that:

> Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement".[143]

In addition to the different type of obligations created by the ECHR, the Court has noted its 'special character (…) as a treaty for the collective enforcement of human rights and fundamental freedoms'.[144] The Court has questioned 'the fact that at the heart of any treaty-based agreement there could only be an agreement',[145] as 'the integrity and unity of the Convention system' go 'beyond the consent- and sovereignty-oriented rules of general international law'.[146] Interpretations must thus be consistent with 'the

---

[136] *Al-Adsani v UK* [GC], App no 35763/97 (ECHR, 21 Nov 2001) para 55, cited in Wildhaber 'The ECHR and International Law' 220. The same phrase is repeated in *Fogarty v UK*, App no 37112/97 (ECHR, 21 Nov 2001); *McElhinney v Ireland*, App no 31253/96 (ECHR, 21 Nov 2001); *Rantsev v Cyprus and Russia*, App no 25965/04 (ECHR, 7 Jan 2010); *M and Others v Italy and Bulgaria*, App no 40020/03 (ECHR, 31 July 2012); *Catan and Others v Moldova and Russia*, App nos 43370/04, 8252/05 and 18454/06 (ECHR, 19 Oct 2012)

[137] In the structure of judgments, international law is often considered as a matter of routine under the heading 'Relevant international law' (eg *Sørensen and Rasmussen v Denmark*, App nos 52562/99 and 52620/99, (ECHR, 11 Jan 2006)), or jointly under 'Relevant domestic and international law' (eg *Chalal v UK*, App no 22414/93 (ECHR, 15 Nov 1996)), or under the heading of 'Relevant comparative and international law' (eg *Othman (Abu Qatada) v UK*, App no 8139/09 (ECHR, 17 January 2012)

[138] Eg *Cyprus v Turkey*, 85 et seq

[139] Merrills, *The Development of International Law by the European Court,* 203; 218-226. An example of the first instance is found in *Van der Mussele v Belgium,* App no 8919/80 (ECHR, 23 Nov 1983), of the second in *Kosiek v Germany*, Application no 9704/82 (ECHR, 28 Aug 1986), and of the third in *National Union of Belgian Police v Belgium*, App no 4464/70 (ECHR, 27 Oct 1975) and *Swedish Engine Drivers*

[140] Wildhaber, 'The ECHR and International Law' 220, 231. See also, broadly, Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP 2010), discussed in Siobhan McInerney-Lankford, 'Fragmentation of International Law Redux: The Case of Strasbourg' (2012) 32(3) *OJLS* 609

[141] *Al-Adsani v UK* cited in Wildhaber 'The ECHR and International Law' 225

[142] Wildhaber 'The ECHR and International Law' 229

[143] *Ireland v UK*, App no 5310/71 (ECHR, 18 Jan 1978), para 239

[144] *Mamatkulov and Askarov v Turkey* [GC] App nos 46827/99 and 46951/99 (ECHR 4 Feb 2005) para 100. Similarly, in *Loizidou v Turkey*, in Wildhaber 'The ECHR and International Law', 220. The Convention's 'special character as a human rights treaty' is recalled in other case law, *inter alia*: *Al-Adsani v UK,* para 55; *Fogarty v UK*; *Cudak v Lithuania*, App no 15869/02 (ECHR, 23 Mar 2010); *Sabeh El Leyl v France*, App no 34869/05 (ECHR, 29 Jun 2011)

[145] Wildhaber 'The ECHR and International Law' 229, citing *Belilos v Switzerland*, App no 10328/83 (ECHR, 29 Apr 1988) and *Loizidou v Turkey*. Other examples are *Banković and others v Belgium*, App no 52207/99 (ECHR, 12 Dec 2001) (compliance with the law on the interpretation of treaties with regards to *ratione loci* jurisdiction) and *Blecić v Croatia*, App no 59532/00 (ECHR, 8 Mar 2006) (on *ratione temporis* jurisdiction and the principle of non-retroactivity)

[146] Wildhaber 'The ECHR and International Law'

general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society'.[147] As such, given its human rights subject matter and its democratic intent, the ECHR is a special type of treaty under PIL and, consequently, the Court may go arbitrarily beyond the letter of the Convention in order to reflect or give effect to IHRL trends within its jurisdiction. Thus, the Court may autonomously recognise right to the truth within the scope of the ECHR, because its special nature as a human rights treaty makes it permeable to global IHRL developments as well as to agreements between states parties to the Convention.

The other side of the relationship between the ECHR and PIL focuses on how the former can be constitutive of the latter. The emergence of the right to the truth in the Court's case law exemplifies this process. ECHR jurisprudence, especially in Grand Chamber formation (like in the *El-Masri* case), carries the potential to contribute to the consolidation of the right to the truth under IHRL as evidence of CIL or general principles of law. The fact that the Court considers itself as a special regime under PIL does not affect the reality of its judgments, which feed into IHRL and human rights debates.

Based on the combined 'repeated inferences of this right in relation to other fundamental human rights by human rights bodies and courts', as well as the proliferation of truth-seeking mechanisms, Naqvi argues that the right to the truth is emerging as 'something approaching a customary right'.[148] Given the 'dynamic relationship between custom and treaty', in which the latter may generate 'new rules of customary law and may eventually acquire probative value for establishing the customary character of the new rules',[149] the scope of human rights could be broadened through Articles 55 and 56 of the UN Charter, authoritatively interpreted in UN work.

Bruno Simma and Philip Alston discuss the 'authoritative interpretation' approach to human rights as such:[150]

> States Parties to the [UN] Charter, having in good faith undertaken treaty obligations to respect "human rights", are subsequently bound to accept, for the purposes of interpreting their treaty obligations, the definition of "human rights" which has evolved over time on the basis of the virtually unanimous practice of the relevant organs of the United Nations.[151]

Nonetheless, this incremental authoritative interpretation approach based on the UN Charter is risky.[152] Meron is sceptical of the 'attempt to endow customary law status instantly upon norms approved by consensus or near-consensus at international law conferences' (such as UN human rights conferences).[153] Similarly, Jack L. Goldsmith and Eric A. Posner warn against 'a vague and easily manipulable consensus criterion' replacing state consent in a context where there power of international law over states is limited by

---

[147] Eg *Mamatkulov and Askarov v Turkey* para 101, citing *Soering v UK,* para 87, and, *mutatis mutandis*, *Klass v Germany,* para 34

[148] Naqvi, 'The right to truth in international law', 267

[149] Meron, *Human Rights and Humanitarian Norms as Customary Law*, 89 et seq

[150] Bruno Simma and Philip Alston, 'The Sources of Human Rights: Custom, jus cogens and general principles' (1988-1989) 12 *AusYBIL* 82, 100

[151] Ibid

[152] Ibid 101; Meron, *Human Rights and Humanitarian Norms as Customary Law*, 81, citing also Prosper Weil, 'Towards relative normativity in international law' (1983) 77 *AJIL* 413

[153] Meron, *Human Rights and Humanitarian Norms as Customary Law*, 87

their self-interests.[154] In addition to the difficulties of ascertaining state practice through consensus, identifying *opinio juris* is also problematic, as '*lex lata* [*may be*] cloaked as *lex ferenda*'.[155]

A more reliable indicator for establishing CIL is proposed by Meron as the 'degree to which a statement of a particular right in one human rights instrument, especially a human rights treaty, has been repeated in other human rights instruments', countered by 'the degree to which a particular right is subject to limitations (clawback clauses)'.[156] References to a right in national law can provide further proof of its consolidation.[157]

The state obligation to investigate serious violations, closely related to the right to the truth, has already been addressed in the context of CIL.[158] Naomi Roht Arriaza acknowledges that 'although state-sponsored grave violations of human rights persist' and states often fail to investigate them, 'other aspects of state practice show that states do recognise these failures as breaches of international norms'.[159] This finds an application in state prosecutions. However, Roht Arriaza cautions against using domestic law as an indicator of state practice, pointing instead to verbal statements of governmental representatives to international organisations as 'recognition of an international obligation to investigate and prosecute'.[160] The recent International Law Commission (ILC) 'Report on identification of customary international law' clarifies some of the uncertainties around what constitutes relevant state practice, confirming that acts of the executive branch in international contexts are included.[161]

Alongside the actions of state representatives which consolidate the customary right to the truth, regional human rights courts enter into dialogue with customary IHRL.[162] For instance, the European Court accepts the binding nature of customary law provisions as part of applicable PIL.[163] Regional human rights courts (as international courts) may contribute to the interpretation and formulation of CIL.[164] Meron identifies this two-way relationship as follows:

> Although regional human rights courts and commissions apply and interpret their constitutive instruments rather than general international law, the cumulative weight of their case-law influences and consolidates the development of customary human rights law.[165]

---

[154] Jack L Goldsmith and Eric A Posner, *A Theory of Customary International Law* (November 1998) The Chicago Working Paper Series in Law and Economics (Second Series), available at: http://www.law.uchicago.edu/Lawecon/workingpapers.html [accessed 5th October 2013], 73 And also Jack L Goldsmith and Eric A Posner, *The limits of international law* (OUP 2005)

[155] Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *AJIL*, 757; Noora Arajarvi, 'Between lex lata and lex ferenda? Customary International (Criminal) Law and the Principle of Legality' (2011) 15 *Tilburg Law Review: Journal of International and European Law*, 163

[156] Meron, *Human Rights and Humanitarian Norms as Customary Law*, 93

[157] Ibid

[158] Roht Arriaza, 'State responsibility to Investigate', 489

[159] Ibid, 492

[160] Ibid, 493

[161] ILC, 'Second report on identification of customary international law' (66th session, 5th May - 6th June 2014), UN Doc A/CN.4/672, para 41

[162] Meron, *Human Rights and Humanitarian Norms as Customary Law*, 80

[163] Eg *Cudak v Lithuania*, para 66

[164] Arajarvi, 'Between lex lata and lex ferenda?', 182

[165] Meron, *Human Rights and Humanitarian Norms as Customary Law,* 89

Meron also highlights that 'the decisions of such organs are frequently and increasingly invoked outside the context of their constitutive instruments and cited as authoritative statements of human rights law'; as such, the jurisprudence of the regional courts, taken cumulatively, 'has a significant role in generating customary rules'.[166] Consequently, the jurisprudence of the Court, including judgments addressing the right to the truth like *El-Masri,* contribute to the customary consolidation of this right in IHRL.

Implicit references to the potential customary nature of the right to the truth can be found in *El-Masri*. With regards to state practice, the findings of the Working Group on Enforced or Involuntary Disappearances (WGEID) cited in the concurring opinion of Judge Tulkens *et al* recall that various countries have worked and cooperated with the WGEID.[167] Similarly, the Human Rights Council's Report on the WGEID states that 'the existence of the right to the truth in international law is accepted by State practice consisting in both jurisprudential precedent and by the establishment of various truth seeking mechanisms in the period following serious human rights crises, dictatorships or armed conflicts'.[168] With regards to *opinio juris*, evidence may be found in the Human Rights Council resolutions listed among the sources of the right to the truth in general IHRL.[169] This suggests, therefore, that in *El-Masri* the Court did not dismiss the potential customary consolidation of the right to the truth.

Alternatively to (but even in conjunction with) CIL it could be argued that the right to the truth is an emerging 'general principle of law as recognised by civilised nations' under Article 38(1)(c) of the ICJ Statute.[170] A comparative analysis of this concept in *El-Masri*, read alongside Inter-American case law and other international law sources (especially at UN level), points in this direction. Yasmin Naqvi has suggested that the jurisprudence of (regional) human rights courts indicates a nascent general principle; more specifically, procedural obligations that address violations of fundamental rights are emerging as 'an expected response by a state to a violation'.[171] This is exactly what happened in *El-Masri*, where the right to the truth was linked to the procedural limb of article 3, as discussed earlier. Whether the recognition of the procedural limb of a Convention right is acceptable and sufficient in order to establish a right (in this case the right to the truth) is more a practical question than a doctrinal one, and will ultimately be tested by the Court's subsequent applications of the new right.

Interpreting the right to the truth through the lens of general principles of law instead of CIL carries the advantage of avoiding the challenging test of state practice. This is because, if Simma and Alston are correct,

---

[166] Ibid, 100

[167] If a state engages with the WGEID on a specific case, it may prove a commitment to the establishment of the truth about the whereabouts of a disappeared person, its own obligation to investigate and the victim's family's right to know the truth. See http://www.ohchr.org/EN/Issues/Disappearances/Pages/Procedures.aspx [accessed 5 October 2013]

[168] 'Report of the Working Group on Enforced or Involuntary Disappearances', 13

[169] On non-binding declarations and resolutions by UN bodies, see Alan Boyle, 'Soft law in international law-making' in Malcom D Evans (ed), *International Law* (OUP 2010); Goldsmith and Posner, *A Theory of Customary International Law*, 73 et seq; Richard B Lillich, 'The Growing Importance of Customary International Human Rights Law' (1995) 25 *GaJICL* 1; Isabelle R Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights' (1990) 31 *VaJIL* 211

[170] On this topic, see inter alia Rudolf B Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations' (1957) 51 *AJIL* 734; Frances T Freeman Jalet, 'The Quest for the General Principles of Law Recognized by Civilized Nations - A Study' (1962) 10 *UCLA Law Review* 1041

[171] Naqvi, 'The right to truth in international law', 268

human rights obligations do not 'run between' states, like other areas of PIL.[172] Instead, in the absence of treaty provisions, but in light of the ILA Report on the Formation of Customary Law, there is a link between human rights and general principles of law.[173] For Simma and Alston, the notion of general principles admits a situation in which 'a norm invested with strong inherent authority is widely accepted even though widely violated'.[174] This, they suggest, 'provides a more plausible explanation of how substantive human rights obligations may be established in general international law, than that offered by a strained, or even denatured "new" theory of custom'.[175] Following this logic, the right to the truth may be understood as an emerging general principle of law. The right to the truth can be 'widely accepted' while being 'widely violated'. A growing acceptance of this right can be drawn from a comparative analysis of the cross-references between the ECHR, the IACHR and other international law sources.[176] Though a welcome development, this right is yet to be accepted and applied as such outside of Latin America, Europe, and UN bodies, which suggests that its standing in all other jurisdictions is still lacking.

The ECHR mentions 'general principles' in Article 7(2) and in Article 1, Protocol I. Merrills argues that the drafters 'saw the use of general principles as inevitable'[177] and as 'part of the fundamental legal fabric'; this potentially open list reflects 'a process in which the resources of legal culture are constantly being scanned by the judicial mind in a search for new solutions'.[178] The comparative method – intrinsic in the workings of a regional court – provides a useful tool in searching for and testing 'new solutions'.[179] In *El-Masri*, the Court considered IACHR jurisprudence and UN sources as well as its own case law relevant to the right to the truth. As such, it examined solutions piloted elsewhere in tentatively suggesting that the right to the truth is somehow connected to the ECHR. Arguably, (at least some of) the judges looked for a general principle that could be applicable in Europe, even if it was generated elsewhere within the constellation of IHRL.

As ECHR jurisprudence is significant internationally, the *El-Masri* case is likely to influence the global understanding of the right to the truth. The 2013 annual report of the Special Rapporteur on the promotion of truth listed the case of *El-Masri* among the regional sources that consolidate the right to the truth, alongside the rich Inter-American jurisprudence and the African Commission on Human and Peoples' Rights recognition of the right to the truth.[180] The UN Human Rights Committee and the IACHR have both referred to European case law in the past to elucidate principles of general international law applicable in their

---

[172] Simma and Alston, 'The Sources of Human Rights', 99

[173] Ibid 100 et seq, referencing International Law Association, American Branch, Committee on the Formation of Customary Law, 'Report of the Committee on the Formation of Customary Law, The Role of State Practice in the Formation of Customary and Jus Cogens Norms of International Law' (1987-1988)

[174] Simma and Alston 'The Sources of Human Rights', 102

[175] Ibid, 104

[176] On the use of the comparative method to deduce general principles of law see *inter alia*: Jalet, 'The Quest for the General Principles' 1081; also Green 'Comparative law as a 'source' of international law'

[177] Merrills, *The Development of International Law by the European Court,* 177, also citing *Golder*

[178] Ibid, 200

[179] On this see *inter alia*, Paolo G Carrozza, 'Uses and misuses of comparative law in international human rights: Some reflections on the jurisprudence of the European Court of Human Rights' (1997-1998) 73 *Notre Dame Law Review* 1217

[180] Report of the Special Rapporteur on the promotion of truth (2013) at 19 and [fn 16]. In relation to the African Commission, the right to the truth is an aspect of the right to an effective remedy to a violation of the African Charter

jurisdictions.[181] Likewise, domestic jurisdictions outside the Council of Europe have been responsive to ECHR case law,[182] as have states parties.[183]

Though politically contested, the far-reaching effects of ECHR jurisprudence have been described by its advocates as justified by the Court's 'responsible decision-making in accordance with the highest traditions of judicial craftsmanship' and grounded firmly in the 'law behind the cases'.[184] As illustrated in *El-Masri*, the provision of separate opinions contributes to the intellectual transparency and nuance in judgments.[185] The Court's legal technique, finesse and reasoning, according to some, places its jurisprudence on a par with the ICJ and other international courts.[186] As such, in addressing the right to the truth, the Court is well placed to contribute to the elucidation of this right not only in its own jurisdiction but also for global international human rights. Given that its jurisprudence carries implications above and beyond the *inter partes* nature of a case, there is reason to believe that the legal and political effects of the right to the truth as introduced in *El-Masri* will echo both throughout Europe and beyond. Nevertheless, while exalting Strasbourg's merits in contributing to the consolidation of the right to the truth, one must investigate whether other jurisdictions and legal traditions can also contribute to the global formation of this right, to avoid a Eurocentric (as well as Latin American, in the case of the right to the truth) focus in establishing and imposing general principles of international law. If the right to the truth is to serve the interests of victims of past violations in the context of TJ, its normative significance should be acceptable across various communities. Failing that, the right to the truth will be at best considered irrelevant in certain transitional settings, and at worst convey neocolonial impositions through externally-introduced truth-seeking initiatives.

In essence, the recent jurisprudence acknowledging the right to the truth contributes to the consolidation of this right under general PIL. The European Court now joins the IACHR and various UN bodies in recognising the right to the truth; the broadened consensus across jurisdictions (two regional IHRL systems and the UN human rights bodies) gives new meaning to this right. In particular, as the ECHR is situated within the scope of IHRL and thus of PIL, the Convention is receptive to global human rights trends as well as constitutive of those trends. Therefore, the Grand Chamber discussion of the right to the truth in *El-Masri*

---

[181] Ibid 18, citing as a sample: UNGA, 'Report of the Human Rights Committee', 34th session (1979) Doc A/33/40, para 246, 345; D McGoldrick, *The Human Rights Committee* (Clarendon Press 1991). On the IACHR references to the ECHR jurisprudence: *Velásquez Rodríguez v Honduras,* para 28*; Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion* (19 January 1984) OC-4/84 (Ser A) No 4, para 56. See also Gerald L Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19(1) *EJIL* 101, 106 et seq

[182] Merrills, *The Development of International Law by the European Court*, 20. On US courts taking stock of the ECHR, see also Erik Voeten, 'Borrowing and non-Borrowing among International Courts' (2010) 39 *Journal of Legal Studies* 547, 565, referencing David Zaring 'The Use of Foreign Decisions by Federal Courts: An Empirical Analysis' (2006) 3 *Journal of Empirical Legal Studies* 297

[183] E.g. in the UK; see *inter alia*, Brenda Hale, 'Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 *HRLR* 65

[184] Merrills, *The Development of International Law by the European Court,* 21, also citing H Lauterpacht, *The Development of International Law by the International Court* (Stevens 1958)

[185] Robin White and Iris Boussiakou, 'Separate Opinions in the European Court of Human Rights' (2009) 9 *HRLR* 37. See also Fred J Bruinsma and Matthijs de Blots, 'Rules of Law from Westport to Wladiwostok: Separate Opinions in the European Court of Human Rights' (1997) 15 *NethQHR* 175; FJ Bruinsma 'The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)' (2007) 2 *Recht der Werkelijkheid* 7

[186] Merrills, *The Development of International Law by the European Court,* 21

consolidates this emerging right under PIL as CIL or as a general principle of law, carrying implications both within the jurisdiction of the ECHR as well as for global IHRL.

5. Conclusions

This chapter demonstrates that recent European jurisprudence acknowledging the right to the truth joins previous IACHR case law and the UN's authoritative recognition, contributing to the consolidation of this right globally. As the ECHR is a human rights treaty within the scope of PIL, it is capable of being receptive to IHRL trends as well as constitutive of new developments, by virtue of the special nature of the principles it seeks to protect and promote. For this reason, the reference to the right to the truth in the *El-Masri* case is situated in the broader international context in which this right has developed. The discussion around the right to the truth in *El-Masri* has been subsequently cited by the Court[187] as well as by the UN Special Rapporteur on truth,[188] which strengthens the argument that the ECHR helps shape IHRL through PIL. As such, in conjunction with other regional and global manifestations of acceptance, the Court may contribute to the establishment of the right to the truth as CIL or a general principle of international law.

Regardless of the scepticism that surrounds the development of a new right, and notwithstanding the fact that the right to the truth still falls short of having a clear definition and scope, its acknowledgement in different fora points unequivocally to its existence and relevance for TJ. The victims' right to the truth counters the authorities' unwillingness to account for abuse, offering opportunities for individual redress as well as collective knowledge of the past, compelling states to investigate human rights violations. This right helps answer the need to provide victims with an incisive tool to hold authorities accountable for serious abuses and negligence, and demand state investigations that carry a deeply transformative role in strengthening the rule of law and promoting confidence in public institutions. Understood in the context of the creation of the legal truth, the right to the truth feeds into the wider discussion around the formation of collective memories outlined in the previous chapter.

In the broader context of relocating TJ to specific settings, the right to the truth enables (in principle) survivors of past abuse – local stakeholders – to instigate truth-seeking endeavours and participate more actively in shaping the process of uncovering legal truths. In that regard, a substantive right to the truth under PIL is remarkably useful for individuals and groups at grassroots level seeking redress for past harm as well as public recognition of the responsibilities of perpetrators. The challenge, however, is making this right justiciable beyond the IACHR and ECHR jurisdictions both substantively and procedurally. Indeed, the future consolidation of the right to the truth as global – i.e. not limited to the IACHR, ECHR and UN – relies on the identification of comparable references in other legal systems, to ensure inclusivity of different perspectives and avoid neocolonial or irrelevant uses of PIL. Applications of the right to the truth in TJ provide opportunities to analyse whether other normative systems can give effect and strengthen this right. The following chapter will analyse the comparative tools for broadening our inquiry into the right to the truth across jurisdictions, and in particular in Muslim-majority legal systems (discussed in chapters 5 and 6).

---

[187] Joint Partly Dissenting Opinion of Judges Zimele, De Gaetano, Laffranque and Keller, *Janowiec and others v Russia*, App nos 55508/07 and 29520/09 (ECHR, 21 Oct 2013), para 9, states: 'in international law there is a clear trend towards recognising a right to the truth in cases of gross human rights violations'; and *Husayn (Abu Zubaydah) v Poland*, App no. 7511/13 (ECHR, 24 July 2014 - application to the Grand Chamber pending) para 489.

[188] Report of the Special Rapporteur on the promotion of truth (2013) at 19 and fn [16]

IV. The Tools to Relocate Transitional Justice in Muslim-Majority Legal Settings

1. Introduction

Transitional justice processes do not rely only on formal laws, but also take into account the complexity of overlapping normative sources in a given context; therefore, although international law conceptions of TJ constitute 'universal standards', they 'can and should accommodate diversity and be responsive to local realities'.[1] The flexibility required for 'cultural diversity and localization', however, need not undermine the development of an 'international law of transitional justice',[2] embracing IHRL (and PIL more generally) alongside other forms of culturally-specific norms that characterise a given society experiencing transition. By highlighting the potential cross-fertilisation between international law and local visions of justice, comparative law may provide conceptual tools to strengthen global principles of TJ through specific applications.

In the wake of the Arab Uprisings there is a pressing need to reassess how TJ applies in Muslim-majority settings. This echoes William Twining's preoccupation with 'concepts and legal discourses' that 'travel well' in an increasingly cosmopolitan world, and the 'dangers of ethnocentric projections' in 'discussing legal phenomena across jurisdictions, traditions and cultures'.[3] International lawyers face the theoretical and practical challenges of localising and adapting international norms TJ elsewhere.[4] Given the impossibility of neatly applying a universal normative framework for TJ based on PIL to complex local realities, this process must be embedded in local conceptions of justice – as set out in the 2004 UN Secretary General Report on 'The rule of law and transitional justice'.[5] The challenge is resisting, on the one hand, apologetic, relativist and deferential approaches to local norms inspired by tradition, religion and custom, and, on the other, blind impositions of the international paradigm of TJ.

This chapter contributes to understanding the relocation of TJ from international law to specific settings through the lens of comparative law. The first part critically discusses why local norms and cultural contexts are relevant to TJ, and considers how the tools of comparative law help international lawyers reckon with foreign legal systems. The second part analyses comparative law as a method for translating international understandings of TJ into local settings, drawing from the theory of formants of legal systems introduced by Sacco. The third part examines international law in light of comparative law as a cultural bridge for localising TJ within an emerging *jus commune*/*jus gentium* framework contributing to a common core across legal systems – and even draw on the Islamic tradition. In the broader context of the research questions, this chapter provides the methodological tools to understand and appreciate the complexities of Muslim-majority legal systems in which TJ is relocated and developed.

---

[1] L Viaene and E Brems, 'Transitional justice and cultural contexts: learning from the Universality debate' (2010) 28(2) *Netherlands Quarterly of Human Rights* 199, 220

[2] Ibid

[3] William Twining, 'Have concepts, will travel: analytical jurisprudence in a global context' (2005) 1(1) *International Journal of Law in Context* 5, 34

[4] For a discussion on legal culture, see *inter alia* David Nelken, 'Disclosing/invoking legal culture: an introduction' (1995) 4(4) *Social and Legal Studies* 435

[5] United Nations Security Council, 'The rule of law and transitional justice in conflict and post-conflict situations: Report of the Secretary General' (23 August 2004) S/2004/616, para 36

2. Localising Transitional Justice: A Challenging Necessity

The 2004 UN Secretary General Report on 'The rule of law and transitional justice' highlights the need to duly take into account 'indigenous and informal traditions for administering justice or settling disputes',

> To help them to continue their often vital role and to do so in conformity with both international standards and local tradition.[6]

Warning against pre-packaged solutions imposed from the outside, the Report stresses how TJ must be localised at all stages to empower the national actors and facilitate local ownership:

> Local consultation enables a better understanding of the dynamics of past conflict, patterns of discrimination and types of victims. (…) A more open and consultative trend is emerging (…). Although the lessons of past transitional justice efforts help inform the design of future ones, the past can only serve as a guideline. Pre-packaged solutions are ill-advised. Instead, experiences from other places should simply be used as a starting point for local debates and decisions.[7]

International law and standards set out by the UN 'accommodated by the full range of legal systems of Member States, whether based in common law, civil law, Islamic law, or other legal traditions' are presented as a safety net for localising TJ.[8] Without clearly stating it, this approach recognises that every TJ process faces a context of legal pluralism in which different rules coexist in a given legal system.[9]

Rosalind Shaw and Lars Waldorf argue that 'the paradigm of transitional justice', as set out in universalist terms, 'is increasingly destabilized by its local applications'.[10] On the one hand, TJ is pulled towards the international legal framework, and on the other, towards localisation.[11] Reckoning with the perceived antagonisms between universal and indigenous norms, therefore, is a necessity when relocating international understandings of transitional justice to local settings. For this reason, one-size-fits-all toolkits do not provide appropriate methods for designing and implementing TJ.

At least in theory, a 'grassroots approach to transitional justice' is better suited to fostering a fully participatory process at all stages of design, development and implementation, following findings in development studies.[12] Patricia Lundy and Mark McGovern identify the democratic deficit at the heart of 'hegemonic international approaches to democracy promoted in post-conflict situations', raising important questions about agency, power relations and dominant interests – such as donors' agendas – that determine

---

[6] United Nations Security Council, 'The rule of law and transitional justice in conflict and post-conflict situations: Report of the Secretary General' (23 August 2004) S/2004/616, para 36

[7] Ibid, 16 et seq

[8] Ibid, 5

[9] SE Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review*, 869, discussed also in Lars Waldorf, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice' (2006) 79 *Temple Law Review* 1. For a discussion of what is meant by 'legal system', see Rene David and E.C. Brierley, *The Major Legal Systems of the World Today* (Stevens and Sons 1985)

[10] Rosalind Shaw and Lars Waldorf (eds), *Localising Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press 2010), 4

[11] Ibid, 5

[12] Patricia Lundy and Mark McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' (2008) 35(2) *Journal of Law and Society* 265

transitional justice processes.[13] Accepting that TJ occurs in a 'contested space', Kieran McEvoy and Lorna McGregor call for a bottom-up perspective, focusing on the communities that have experienced the violence, which operate below formal institutions and distinctly from the elites.[14] But just as the hegemony of international and national elites may perpetuate structural unfairness, even bottom-up transitional initiatives are capable of replicating partners of dominance and violence. Therefore, alongside PIL, both local and external stakeholders in the design and implementation of TJ processes must search for a normative contribution from below and be critically aware of local customs and rules in order to localise TJ through the participation of those affected and their versions of justice.

Evaluating the centrality of customary forms of justice in post-conflict (transitional) settings, Deborah Isser sets out three main arguments.[15] Firstly, customary justice systems 'are and will likely remain far more accessible and effective than the broken and mostly distrusted formal systems'; secondly, 'they offer a paradigm of justice preferred by much of the population and can often resolve problems that the formal justice system cannot', such as 'root causes of conflict, ending cycles of blood vengeance, resolving sociospiritual problems, and promoting social reconciliation'; thirdly, 'constructively engaging customary justice systems can improve the legitimacy of the state and its formal institutions'. Isser presents legal pluralism as an opportunity for the justice sectors of post-conflict settings, highlighting three further aspects to consider: the 'sociocultural basis of customary justice systems', their limitations, and the relationship between customary and formal justice systems.[16]

Mindful of the continual supremacy of international law in TJ, Catherine Turner stresses that 'international standards should provide guidelines, not provide a strait-jacket upon independent thought', and calls for a 'process of local, social and cultural engagement and of attempts to produce context-specific consensus' facilitated by the international community.[17] But, naturally, tensions may arise between customary forms of justice and the standards set out in international law in the localisation of TJ. For instance, Isser describes customary justice systems as 'guardians of the dominant social and cultural beliefs of their societies', which preserve a 'conservative social order often characterised by a patriarchal hierarchy and social inequalities'.[18] She suggests that instead of accepting principles so wholly at odds with basic IHRL standards, their purpose and broader social significance ought to be taken into account in understanding a given local setting. This would mean embedding IHRL standards in the language of local customary forms of justice for the purpose of transition. However, the transformative features of TJ may also foster new interpretations of customary justice that could be purposefully oriented towards IHRL by relevant stakeholders. Indeed, if successor authorities are serious about the transitional aims of accountability, justice and reconciliation, with all its

---

[13] Ibid, 275

[14] Kieran McEvoy and Lorna McGregor (eds) *Transitional justice from below: Grassroots activism and the struggle for change* (Hart, 2008), 2 et seq

[15] Deborah Isser (ed), *Customary Justice and the Rule of Law in War-torn Societies* (United States Institute of Peace Press 2011), 326 et seq

[16] Ibid, 327 et seq

[17] Catherine Turner, 'Delivering lasting peace, democracy and human rights in times of transition: The role of international law' (2008) 2 *IJTJ* 126, 149

[18] Isser, *Customary Justice*, 334

faults the rights paradigm provides language, concepts and opportunities for critique to rebuild broken societies.

These tensions are reminiscent of the universality v relativism debate in human rights;[19] the fact that TJ relies heavily on IHRL, suggests that it may have unwittingly inherited some of its problems. Mindful of this challenge, Lieselotte Viaene and Eva Brems have argued that TJ is better-placed in facing this deadlock for four main reasons: TJ is emerging in developing contexts and not in the West; the unacceptability of past harm is uncontested; cultural specificity claims are mostly external and academic; and, finally, the international law of TJ is at an early stage and thus can still integrate cultural diversity.[20] Their calls for a revisitation of 'traditional and local culture' to consider 'traditional and informal justice systems' as part of TJ are essential,[21] but the practical difficulties of doing so are immense, largely due to the inability of international lawyers that dominate the discipline to think more critically about its inherently pluralistic sources.

The complex relationship between law, culture and society is key to understanding how TJ is localised.[22] Austin Sarat and Jonathan Simon have argued for legal scholarship to 'embrace cultural analysis and cultural studies',[23] as a 'kind of epistemological corrective to the plethora of problems posed for postrealist legal studies by the crisis of the social liberal state'.[24] But this approach unearths other issues: much like the notion of tradition analysed by Hobsbawm and Ranger,[25] the very 'idea of cultural authenticity' is questionable,[26] and risks essentialising foreign legal cultures instead of recognising that societies and states are not culturally

---

[19] On the relativism-universality debate, see inter alia: Jack Donnelly, 'Cultural relativism and universal human rights' (1984) *HRQ* 400; Jack Donnelly, 'The relative universality of human rights' (2007) 29(2) *HRQ* 281; Michael Goodhart, 'Neither relative nor universal: A response to Donnelly' (2008) 30(1) *HRQ* 183; Alison Dundes Renteln, *International Human Rights: Universalism versus Relativism* (Quid Pro Books 2013); Eva Brems, *Human rights: Universality and diversity* (Martinus Nijhoff Publishers 2001); and, in relation to Islamic law, Abdullahi Ahmed An-Na'im, 'Islam and Human Rights: Beyond the Universality Debate' (2000) *American Society of International Law,* Proceedings of the 94th Annual Meeting

[20] Viaene and Brems, 'Transitional justice and cultural contexts', 202 et seq

[21] Ibid, 212 et seq

[22] For a background on this relationship, see Laura Nader (ed) *Law in Culture and Society* (Aldine, 1969)

[23] Austin Sarat and Jonathan Simon, 'Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship', in Austin Sarat and Jonathan Simon (eds), *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism* (Duke University Press 2003), 4. For the purposes of this thesis, 'cultural studies' is 'a tendency across disciplines, rather than a discipline itself', as expressed by Toby Miller, 'What It Is and What It Isn't: Cultural Studies Meets Graduate Student Labour', in Sarat and Simon (eds) *Cultural Analysis, Cultural Studies, and the Law*, 73

[24] Ibid. For a background on legal realism see *inter alia*: Roscoe Pound, 'The Call for a Realist Jurisprudence' (1931) 44(5) *Harvard Law Review* 697; Karl N Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44(8) *Harvard Law Review*, 1222; LL Fuller, 'American Legal Realism' (1934) 82(5) *University of Pennsylvania Law Review and American Law Register*, 429. In brief: 'What judges really do, according to the realists, is decide cases according to how the facts of the cases strike them, and not because legal rules require particular results; judges are largely "fact-responsive" rather than "rule-responsive" in reaching decisions. How a judge responds to the facts of a particular case is determined by various psychological and sociological factors, both conscious and unconscious', as summarised by Brian Leiter, 'Legal realism', in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell 1999). For a summary of legal postrealism, see Neil Duxbury, 'Post-realism and legal process', in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell 1999), exploring two variants: policy science and legal process, both concerned with the links between law and politics

[25] E Hobsbawm and T Ranger, *The Invention of Tradition* (1983)

[26] Sarat and Simon, 'Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship', 12, citing James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature and Art* (1988) and TM Luhrmann, 'Review of Hermes' Dilemma and Hamlet's Desire: On the Epistemology of Interpretation' (1993) 95 *American Anthropologist* 1058

homogeneous.[27] It should also identify dynamics of power and subjectivity,[28] challenge traditional ideas of culture and advance new (better) conceptions of law,[29] instead of returning to romanticised golden era of a distant past and impose its rules on contemporary societies. Moreover, as (all) law proposes a 'distinctive manner of imagining the real', it is itself constitutive of culture.[30] This final point echoes the earlier discussion on the formation of legal truths, which in turn feed into historical narratives and cultural dynamics.

Rejecting the artificial separation between law and culture, Naomi Mezey sees 'law as culture and culture as law', borrowing from the ethnographic method that studies how 'specific cultural practices or identities coincide or collide with specific legal rules or conventions' thus 'altering the meanings of both'.[31] She sees ethnography as providing both explanation and and 'cultural interpretation' of the law in three main ways:

1. Interpretation of law at a site of production (the courtroom, the committee room, etc.), which would make use of both traditional and non-traditional modes of legal interpretation;
2. Interpretation of the cultural practices that might be said to inspire the law and those that the law confronts when applied;
3. Interpretation of the interventions of culture in law and law in culture, of the dissolution of production and reception into a circulation of the interdependencies, contradictions, and conspiracies in meaning.[32]

By setting aside the (positivist) need for discreteness and determinacy,[33] a complex, varied and improvised relationship between law and culture emerges. This offers a more accurate explanation of the contexts in which TJ is localised, taking stock of the fact that law and culture cannot be disentangled. As such, the rules of any system are likely to express dominant beliefs grounded in the cultural values of powerful community stakeholders. This links TJ localisation to both formal and informal norms informed by cultural practices.

The relationship between law and culture reaches its peak in relation to human rights, which in turn guide TJ. Culture connects to human rights in ways that both enhance and restrict the realisation of those rights;[34] intersections include the right to cultural participation and the right to enjoy one's own culture, but culture may also be an obstacle or barrier to the enjoyment of human rights and promote harmful practices.[35] As

---

[27] H Patrick Glenn, 'Legal Cultures and Legal Traditions' in Mark Van Hoeck (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004), 18, also referencing Edward Said, *Orientalism* (Vintage Books, 1978)

[28] Ibid, 8, citing Stuart Hall, 'Cultural Studies: Two Paradigms', in Nicholas B Dirks et al (eds) *Culture/Power/History: A Reader in Contemporary Social History* (Princeton University Press 1993)

[29] Ibid, 9, citing Carol Weisbrod, *Emblems of Pluralism: Cultural Differences and the State* (Princeton University Press 2002)

[30] Sarat and Simon, 'Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship', 13 et seq, citing Clifford Geertz, *Local Knowledge: Further Essays in Interpretative Anthropology* (1983) and Susan Silby, 'Making a Place for a Cultural Analysis of Law' (1992) 17 *Law and Soc Inquiry 39*

[31] Naomi Mezey, 'Law as Culture', in Sarat and Simon, *Cultural Analysis, Cultural Studies, and the Law*, 38; and 54, 56, citing Clifford Geertz, *The Interpretation of Cultures,* (Basic Books 1973)

[32] Ibid, 57

[33] Ibid, 60

[34] Culture is presented as an inhibitive force to the enjoyment of human rights in CEDAW, UN General Assembly, 'Convention on the Elimination of All Forms of Discrimination Against Women' (18 December 1979) United Nations Treaty Series, vol 1249, 13 in the Preamble and Article 5(a): 'To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'

[35] Discussed in Jessica Almqvist, *Human Rights, Culture, and the Rule of Law* (Hart 2005), 8 et seq

such, this relationship is inherently ambivalent and but not per se undesirable. A deeper engagement with the perspectives of cultural studies and ethnography would help international lawyers navigate the universality v relativism debates in IHRL which overshadow potential synergies between culture and law in delivering human rights aims in TJ. Therefore, although the localisation of TJ destabilises its emerging international paradigm, grassroots participation is necessary, as argued by the authors reviewed. This will inherently reflect the dominant cultural traits of a society, which is neither good nor bad, but should be reckoned with openly.

Rejecting the tendency to 'demonise culture' in human rights circles, Sally Engle Merry argues that culture is not necessarily 'a barrier to progress' as opposed to 'modernity and the laws of human rights' purportedly 'culture-free'.[36] Drawing instead on anthropology, she suggests that the 'human rights legal system produces culture' by identifying problems and articulating 'normative visions of a just society' (and the related procedural rules to make complaints) and imposing them at national and international levels.[37] Both Merry and Jessica Almqvist link culture to power dynamics and political appropriation – just like law. Consequently, culture may be used to shield violations, but also to further human rights enjoyment.[38] To understand the relationship between culture and human rights, Almqvist cautions against excessive reliance on controversial propositions, idealism, simplicity, and particularism.[39] For these reasons, it is essential to understand the interaction of law and culture for localising TJ in a given setting.

Going back to the overarching research question of this thesis, the relocation of TJ from international law cannot refuse the cultural context altogether or embrace it without further scrutiny. In other words, neither pure relativism nor pure universality are fit for the task of localising TJ in Muslim-majority legal settings, as explored in subsequent chapters. Instead, TJ should be made palatable to both traditional and progressive actors, depending on the balance appropriate to each setting and negotiated politically and democratically. Therefore, IHRL and other international standards will inevitably coexist alongside other forms of culturally-specific norms that characterise a given society experiencing transition. Giving due consideration to both is imperative for TJ to be relevant and of use.

2.1 Reckoning with a Foreign Legal System

Since the end of the Cold War, international relations has increasingly turned to cultural identities to explain violence and conflict.[40] Most notably, after 9/11, this resulted in the tendency to present international law and

---

[36] Sally Engle Merry, 'Human Rights Law and the Demonization of Culture (And Anthropology along the Way)' (2003) 26(1) *PoLAR* 55; 60; 62 7

[37] Ibid, 70 et seq

[38] Almqvist, *Human Rights, Culture, and the Rule of Law*, 40; 219 et seq

[39] Ibid, 25 et seq

[40] In that regard, the theorisation of post-Cold War world orders has heavily relied on perceptions of culture. Inter alia, Francis Fukuyama, *The end of history and the last man*, (Penguin, 1992), xiii, xv, xix; and Samuel Huntington, 'Clash of Civilisations?' (1993) 72(3) *Foreign Affairs* 22, 23: 'It is far more meaningful now to group countries not in terms of their political or economic systems or in terms of their level of economic development but rather in terms of their culture and civilization'. The theme of culture in Huntington has been noted elsewhere by comparative lawyers, *inter alia*, H Patrick Glenn, 'Legal Cultures and Legal Traditions' in Mark Van Hoeck (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004) 7, 17

Islam as opposed to each other.[41] In light of the previous discussion, these approaches seem academically misguided and incapable of being of practical use in understanding the culture and laws of Muslim-majority communities. Instead, viewing Islamic law simply as a legal system different to PIL may be more useful for the relocation of TJ. As such, the methods of comparative law are better suited to analysing links between law and culture,[42] in order for lawyers to become 'culturally fluent' in another legal language'.[43] The problem is that not all lawyers are well-equipped to do so.

Some scholars have remarked that 'in the society of jurists, the duties of the explorer' fall on the comparative lawyers, who 'travel through the frontier of law'.[44] Indeed, 'comparative law is somewhat like traveling'.[45] But observing 'a foreign legal system from the outside' is complicated.[46] Lasser calls for an awareness of limitations and responsible engagement with the object of study,[47] as one's cultural starting point is likely to determine how norms are understood.[48] This could take the form of 'the 'inner' perspective',[49] bring an outside view, or focus on 'trans-cultural unity'.[50] In order to understand and interpret the distinctive cultural features that influence a legal system, anthropology can help.[51] This interdisciplinary angle is more likely to provide the basis for constructively engaging local norms in designing relevant TJ processes. As such, international lawyers attempting to localise TJ in Islamic settings (or any setting, for that matter) benefit from comparative methods.

---

[41] See in general Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order* (Hart 2005); Shaheen Sardar Ali and Javaid Rehman, 'The Concept of Jihad in International Islamic Law' (2005) 10(3) *Journal of Conflict & Security Law* 321

[42] For an overview on the discipline of comparative law see *inter alia* Annelise Riles (ed), *Rethinking the Masters of Comparative Law* (Hart Publishing 2001); Zweigert and Kötz, *An Introduction to Comparative Law*, (3rd ed, OUP 1998); and Ugo Mattei, Teemu Ruskola, and Antonio Gidi, *Schlesinger's Comparative Law* (2009), in celebration of Rudolf Schlesinger, author of *Comparative Law Cases and Materials* (The Foundation Press 1950). For an overview of the history of comparative law, see *inter alia*, Rodolfo Sacco, 'One Hundred Years of Comparative Law', 75 *Tulane Law Review* 1159

[43] Nils Jansen, 'Comparative Law and Comparative Knowledge' in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (OUP 2006), 306, referencing, *inter alia*, Pierre Legrand, *Fragments on Law as Culture* (1999)

[44] Sacco, 'One Hundred Years of Comparative Law', 1175. Sacco's legacy in comparative law is notable; as the primary draftsman of the Tesi di Trento (Trento, 3 June 1987), he contributed to developing the contemporary understanding of comparative law. The Tesi di Trento can be found in their original version at http://www.jus.unitn.it/cardozo/Review/2008/Trento2.pdf [accessed 15th September 2013].

[45] Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411

[46] Mitchel De S.-O.-L'E. Lasser, 'The Question of Understanding', in P Legrand and R Munday (eds) *Comparative Legal Studies: Traditions and Transitions* (CUP 2003), 221

[47] Ibid, 235 et seq

[48] Nelken, 'Disclosing/invoking legal culture', 444

[49] James Whitman, 'The neo-romantic turn', in Legrand and Munday, *Comparative Legal Studies,* 314 et seq, referencing William Ewald 'Comparative jurisprudence (II): the logic of legal transplants' (1995) *American Journal of Comparative Law* 489

[50] George P Fletcher, 'Comparative Law as a Subversive Discipline' (1998) *American Journal of Comparative Law* 683, 691; 693 et seq

[51] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)' (1991) *American Journal of Comparative Law* 1, 7 et seq. Also, Sacco, 'One Hundred Years of Comparative Law', 1174 et seq, in which it he argues that 'anthropologists are in the process of teaching [lawyers] to reflect on the law and its manifestations', as they 'speak more to the comparativists than to the jurists in general' and precede them 'when it comes to penetrating certain domains'

Comparative law is not limited to analysing official state law or other types of formal law. It also looks at broad patterns of social order and rules which have yet to be formalised, even in the absence of centralised state power,[52] considering 'whatever gives individuals incentives strong enough to affect their social behaviour'.[53] Rodolfo Sacco terms these abstract normative principles 'genotypes' (theoretical norms), whereas he calls their contextual tangible expressions 'phenotypes'.[54] These dual concepts identify the prescriptive force of culture and customary forms of justice alongside other rules that make up a legal system, and as such inform the process of relocating TJ in a culturally-responsive manner.

Introducing a romantic/hermeneutic approach, James Whitman also suggests that comparative law should engage 'the unspoken, taken-for-granted body of assumptions and beliefs that inform and motivate the law in different societies'.[55] Nevertheless, he cautions against basing one's understanding of a legal system solely on internal actors and adopting a distinctively apologetic angle.[56] Thus, the indispensable internal perspective of a given legal system should remain open to scrutiny, especially when local understandings of justice and IHRL collide in practice. Clearly, human suffering determined by political, economic, social or other factors cannot hide behind cultural peculiarities.

The analysis of the relationship between law and culture required of the international lawyer localising TJ raises another issue. As stated by Paul Kahn, 'bringing cultural study into the heartland of the legal academy is a way of putting the self at risk', inasmuch as the 'subject of that inquiry is always the self'.[57] Indeed, as non-Muslims investigating TJ for Islamic settings, openly acknowledging the inescapable role of one's own identities – cultural and disciplinary – in the process of analysis is a small but necessary gesture of intellectual honesty.

Can a researcher be excluded by virtue of her identities and perspectives from investigating transitional justice for Islamic settings? Based on the contributions of Edward Said, who rejects a priori exclusions from scholarly endeavours, one is mindful of the risks of:

> A double kind of possessive exclusivism (…) being an excluding insider by virtue of experience (only women can write for and about women, and only literature that treats women and Orientals well is good literature), and (…) by virtue of method (only Marxists, anti-Orientalists, feminists can write about economics, Orientalism, women's literature).[58]

The dangers of 'othering'[59] and excluding a researcher on the basis of a perceived personal or scholarly identity can be tempered by the framework provided by comparative analysis, including comparative law, in

---

[52] Sacco, 'Legal Formants (Instalment I of II)', 7; 9

[53] Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45 *The American Journal of Comparative Law* 5, 13

[54] Mattei, 'Three Patterns of Law', 16

[55] Whitman 'The neo-romantic turn', 315. For a background on hermeneutics, see *inter alia* Robert J Dostal (ed) *The Cambridge Companion to Gadamer* (Cambridge University Press 2002); Hans-Georg Gadamer, *Philosophical Hermeneutics* (University of California Press 2008)

[56] Ibid, 334

[57] Paul W Kahn, 'Freedom, Autonomy, and the Cultural Study of Law' in Sarat and Simon, *Cultural Analysis, Cultural Studies, and the Law*, 176 et seq

[58] Edward Said, 'Orientalism Reconsidered' (1985) 1 *Cultural Critique* 89, 106 et seq

[59] On the notion of 'other' refer to Said, *Orientalism* (1978) and Simone de Beauvoir, *Le Deuxième Sexe* (1949)

which being 'other' to something is a prerequisite for study and evaluation. To that effect, some have aptly pointed out that 'the cultural Other is in principle not different from the intra-cultural or historical Other',[60] and, one may add to this, disciplinary other. Nevertheless, these distinctions may be more artificial than authentic.

The 'assumption of a fundamental distinction between self and other' has been critiqued by cultural anthropologist Lila Abu-Lughad in her seminal 'Writing Against Culture';[61] she argues that culture enforces 'separations that inevitably carry a sense of hierarchy'. One could also posit that comparative lawyers are better placed to investigate TJ for Islamic settings than international lawyers, or that an Islamic law scholar is more likely to succeed than a legal theorist in analysing doctrinal perspectives.

In dismantling the perceived hiatus between self and other, Abu-Lughad discusses the human category of 'halfies', which inherently 'unsettle the boundaries between self and other', and consequently radically renegotiate that sense of cultural hierarchy.[62] Many international lawyers engaged in questions of Islamic law and comparative law become 'halfies'. Moreover, the developing framework of reference and past experiences of TJ is in itself hybrid, which forces scholars to cross into domains which do not necessarily constitute their starting point. International organisations and prominent scholars alike have displayed 'halfie' characteristics. Notably, the 2004 UN Secretary General document on Transitional Justice traces a clear connection between TJ, human rights and multiple legal traditions, expressly including Islamic law, rejecting PIL purism in the discipline.[63] Similarly, academics such as Cherif Bassiouni and Abdullahi Ahmed An-Na'im operate comfortably across PIL and Islamic law.[64] In TJ discussions around the Arab Uprisings, cultural dualisms break down assumed antagonisms of Self and Other lawyers.[65] Comparative law can help navigate these dualisms for the purpose of translating TJ in Muslim-majority contexts.

A non-comparative approach to the localisation of TJ risks underestimating the importance of a culturally-responsive normative framework. Thus, purist approaches based on one discrete set of norms may provide a framework of reference based on a solid and coherent internal logic, but are unsuitable for the complex reality of transitional settings where different normative principles coexist in a system of legal pluralism. Summing up, transitional justice is guided by international law as well as by bottom-up customs and cultures. As such, IHRL standards, customary forms of justice and cultural practices coexist in TJ, which is more likely to reflect the aspirations of a border range of stakeholders and beneficiaries if different normative

---

[60] Heiner Schwenke and Anne Peters, 'Comparative law beyond post-modernism' (2000) 49(4) *ICLQ* 800, 834

[61] Lila Abu-Lughad, 'Writing Against Culture', in Richard G Fox, *Recapturing Anthropology: Working in the Present* (School of American Research Press 1991), 137

[62] Ibid

[63] UN, 'The rule of law and transitional justice in conflict and post-conflict situations'. Islamic law is mentioned twice in this document, 10 and 61

[64] See*, inter alia*, Abdullahi Ahmed An-Na'im, 'Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives: A Preliminary Inquiry' (1990) 3 *Harv Hum Rts J* 13; M. Cherif Bassiouni, *Islamic Criminal Justice System* (New York: Oceana Publications 1982)

[65] For instance, noted by the author at the *Criminal Justice And Accountability In Arab Transition Processes Expert Conference*, jointly organised by German Center for International Peace Operations (ZIF) and the Cairo Regional Center for Training on Conflict Resolution and Peacekeeping in Africa (CCCPA), as well as the Criminal Law and Judicial Advisory Service of the United Nations Department of Peacekeeping Operations 25-27 September 2012, details at http://www.cairopeacekeeping.org/cms.php?id=course_session_details&course_session_id=102 [accessed 15 April 2013]

principles are included in the process. Therefore, in light of the universality v relativism debate, TJ is well placed to test new solutions which are responsive to a wider range of sources. A constructive way to embed TJ in various norms is offered by comparative lawyers, whose methods are suited to capturing and critically interpreting cultural meanings of law and engage in interdisciplinary dialogues which investigate the unseen normative patterns of societies.

3. Comparative Law Methods

In translating TJ to Muslim-majority settings, international lawyers are likely to face cognate disciplines that comparative lawyers reckon with ordinarily, such as philosophy, history, anthropology and sociology. Comparativists, therefore, are well placed in capturing the 'diversity, change, or history' in which transitional justice occurs, searching for 'all the factors that, by nature, influence the creative process of law and shape the rule and the life of law'.[66] As such, to serve the purposes of TJ, comparative law ought to 'become part of interdisciplinary research and serve the scholar concerned with problems of sociology and politics'.[67] This raises further questions as to the relationship between comparative law and power structures in the international arena.

In a provocative contribution, Günter Frankenberg expresses surprise at how comparative law has left the ivory tower 'to become an ally of power, an integral element of the new regime of consultants' and a tool of political intervention.[68] He notes the 'Janus-faced persona' of mainstream comparative law:

> The self-proclaimed humanist and idealist in search of the ideal law uneasily coexisting with the pragmatic politician who is partial to unity and standardization under the auspices of the very rule of law he likes best. Together these two projects constitute the hegemonic self, a representative of legal paternalism.[69]

Frankenberg accuses mainstream comparativists of 'suppress[ing] their subjectivity and hid[ing] their peculiar perspective behind the rhetoric of objectivity and neutrality', 'camouflaging their politics' and avoiding 'immersion into the other' until they recognise their own prevailing culture.[70] In light of this, the conscientious international lawyer localising TJ in Islamic settings is likely to reflect the traits of the tragic comparative lawyer he describes. As such, a strategic use of comparative law can help recognise ethnocentrisms when applying TJ concepts to local contexts. Becoming culturally and professionally self-aware is a necessary step for international lawyers whose cross-cultural work – necessarily guided by their own beliefs and attitudes about the law – contributes to TJ processes. The mindfulness stimulated by comparative methods is the first step towards more conscientious and self-critical approaches to intercultural applications of international law, including the localisation of the international paradigm of TJ.

In a broader sense, conscientiousness and self-restraint seem to be core features of comparative law. Zweigert and Kötz suggest that comparative law shows up the 'hollowness of traditional attitudes – unreflecting, self-assured, and doctrinaire', and contextually enables deeper insights into the law.[71] The origins of comparative law, however, are not as enlightened and progressive, revealing entrenched colonial attitudes towards foreign (i.e. 'native' or 'primitive') legal systems. As such, caution must be exercised in

---

[66] Sacco, 'One Hundred Years of Comparative Law', 1170

[67] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)' (1991) 39(2) *American Journal of Comparative Law*, 343, 388 et seq. Sacco notes: 'Comparative law can offer its conclusions to sociology. If sociology does not utilise them, it is not the comparativist's fault'

[68] Günter Frankenberg, 'Stranger than Paradise: Identity and Politics in Comparative Law' (1997) 2 *Utah Law Review* 259, 260

[69] Ibid, 262 et seq

[70] Ibid and 269 et seq

[71] Zweigert and Kötz, *An Introduction to Comparative Law*, 33 et seq. Sacco also celebrates the achievements of comparative law in fostering critical approaches in 'One Hundred Years of Comparative Law', 1159

adopting comparative methods in the localisation of transitional justice to Islamic settings, in order to avoid the pitfalls of ethnocentrism or ethnic apology.

The colonial heritage of comparative law encompasses a number of features, which Upendra Baxi describes as 'an ethical enterprise, an affair of history and an ensemble of practices of violence'.[72] Narratives of progress, modernity and legal development contribute this vision. Baxi identifies three legacies of colonial legality: mercantilist governmentality, high-colonial legality and the lower degree of civil freedom.[73] The first conceals economic and commercial profit behind the moral end of colonial legality; the second concerns the construction of judicial spheres (such as common-law and civil-law ones) connected to imperialism, and the related forms of legal pluralism; the third seeks to introduce the notion of legality in the colonies, albeit at the service of colonial intentions.[74] In this sense, the law carries within it a project of domination and, as such, comparative law may both serve and restate that power and agency divide between individuals.

The First International Congress for Comparative Law in 1900 in Paris and initial proponents such as E. Lambert and R. Saleilles explicitly sought to develop a common law of mankind, as a consequence of human progress aided by the comparative method.[75] Around the same time, PIL was developing as a result of nineteenth century imperialism, in which uniform rules set out by colonial powers governed the rest.[76] Contemporary scholars of comparative law have traced its origins back to natural law vision of Aristotle and Thomas Aquinas (thus preceding positivism).[77] Gordley outlines a parallel teleological relationship between principle and rule, and higher and lower order principles, which are accompanied by a form of (discretionary) 'prudence' to evaluate the appropriateness or worth of a certain principle.[78] Consequently, according to this analysis, human fallibility explains variations across legal systems given that 'different laws may be consistent with the same principles'.[79] As such, different expressions of the same principle may be evaluated according to their fidelity to the presumed original principle to be upheld, leading to a type of analysis which is ill-fitted to the requirements of legal systems that are human-oriented and not higher-principle oriented.

More recently, comparative law scholars have dismissed the unification project of the discipline's earlier days.[80] For instance, Sacco celebrates the achievements of comparative law by highlighting the value placed on legal diversity and pluralism, and the decline of legal nationalism.[81] In that regard, comparative law seems receptive to the central tenets of legal pluralism. The centrifugal and centripetal effects of comparative law – i.e. identifying the convergence or highlighting the differences between norms – can be reckoned with

---

[72] Upendra Baxi, 'The colonial heritage', in Legrand and Munday, *Comparative Legal Studies*, 46 et seq

[73] Ibid, 57 et seq

[74] Ibid

[75] Zweigert and Kötz, *An Introduction to Comparative Law*, 2 et seq. For a critical overview of the history of comparative law, see *inter alia*, Sacco, 'One Hundred Years of Comparative Law', 1159

[76] Antony Anghie, 'Finding the peripheries: sovereignty and colonialism in nineteenth-century international law' (1999) 40 *Harv Intl LJ* 1; and also A Anghie, *Imperialism, sovereignty and the making of international law* (CUP 2007)

[77] James Gordley, 'The Universalist Heritage', in Legrand & Munday, *Comparative Legal Studies*, 31 et seq

[78] Ibid, 32 et seq

[79] Ibid, 40

[80] Sacco, 'One Hundred Years of Comparative Law', 1165 et seq

[81] Ibid, 1165, 1167. See also similar arguments in Pierre Legrand, 'The Same and the Different', in Legrand & Munday, *Comparative Legal Studies*, 299

according to the stated aim of each comparison (this will be discussed with reference to PIL in the following section).

But must the discipline of comparative law have a specific intention other than comparison? Zweigert and Kötz argue that the 'basic methodological principle of all comparative law is functionality', focusing on identifying solutions for concrete problems.[82] In selecting which legal systems to compare, based on their degree of similarity, Zweigert and Kötz simply suggest a rule of thumb, flexible enough to compare virtually any legal system, if appropriate to the research question. Indeed,

> If law is seen functionally as a regulator of social facts, the legal problems of all countries are similar. Every legal system in the world is open to the same questions and subject to the same standards, even in countries of different social structures or different stages of development.[83]

A vocal critic of this functionalist position, Frankenberg is sceptical of oversimplifications that negate or marginalise 'the effects of legal forms and ideas in the realm of consciousness as ideologies and rituals' for the sake of problem solving.[84] Nevertheless, the imitation of foreign models – legal borrowing and 'transplants'[85] – brings to light how elites choose to draw on foreign law.[86] But regardless of its practical potential and applications, argues Sacco, 'comparative law remains a science as long as it acquires knowledge'.[87]

An additional question to ask regards the object of study of comparative law. Today, it is established that comparativists do not just analyse the 'law' of statutes and cases, nor can they assume that a legal system is a monolithic, monocultural and coherent normative apparatus. Indeed, it has long been acknowledged that the use of comparative law 'requires a knowledge not only of the foreign law, but also of its social, and above all its political, context', and that legalism without an appreciation of the context can be detrimental to the aims of comparative law.[88] Some have identified invisible features of legal systems which are often hidden to the lawyers operating within that system.[89] As such, the context and the underpinnings of a system inform the analysis of comparative lawyers, who cannot limit their inquiry to black letter law. Although positive norms have long been juxtaposed to other elements of law, especially among theorists, comparative lawyers whose discipline is both deeply theoretical and very practical look beyond black-letter law as a matter of routine.

Legal systemology, as described by René David, is based on the notion that 'despite the diversity of laws encountered in the world today, it is possible to concentrate on certain "models", certain laws which can be considered typical and representative of a family which groups a number of laws'.[90] The law of each country

---

[82] Zweigert and Kötz, *An Introduction to Comparative Law*, 34 et seq

[83] Ibid, 46

[84] Frankenberg, 'Critical Comparisons', 434 et seq. Similar objections to functionalism are found in Michele Graziadei, 'The functionalist heritage', in Legrand and Munday, *Comparative Legal Studies*, 113

[85] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1974)

[86] Graziadei, 'The functionalist heritage', 124 et seq

[87] Sacco, 'Legal Formants (Instalment I of II)', 4

[88] Otto Kahn−Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) *Modern Law Review* 1, 27

[89] Sacco, 'Legal Formants (Instalment II of II)', 387 et seq. Sacco notes that these features remain cryptotypes until they are spotted through comparative studies.

[90] David and Brierley, *The Major Legal Systems*, 1

'in fact constitutes a system: it has a vocabulary used to express concepts, its rules are arranged into categories, it has techniques for expressing rules and interpreting them, it is linked to a view of the social order itself which determines the way in which the law is applied and shapes the very function of law in that society'.[91] David cautions against focusing on given rules of a particular legal system (seen as a political entity, a state), and instead directs towards seeking out those characteristics which constitute fundamental and constant elements underlying specific rules.[92] As such, black letter law is but a part of the overall structure of a legal system.

This approach identifies two main criteria upon which to base the classification of laws into families; firstly, the 'law's conceptual structure' (i.e. 'the theory of the sources of the law'); secondly, 'social objectives to be achieved with the help of the legal system or the place of law itself within the social order' (for this aspect, refer to the previous discussion on functionalism).[93] The distinction of legal families proposed by David is heavily reliant on a Eurocentric notion of what constitutes a legal system, revealing a tendency to consider as legal 'other' any system that does not follow the conventional western face of the law. Since the classic texts of David, more recent studies supporting the framework of legal families as expressions of relatively linear legal traditions have been received with much scepticism.[94] Nevertheless, the usefulness of David's 'legal families' approach rests in the fact that all norms can be somehow compared. Moreover, as comparative law originated in relation to legal history, its relevance extends to historical developments of law as well.[95]

Many approaches to understanding legal families have been presented by comparative lawyers, and modes of classification are presumably as numerous as the issues and details that scholars may choose to analyse. Accepting the notion of 'law as a tool of social organisation',[96] Mattei lists law, politics, religious and philosophical traditions as the elements that make up the three patterns of rule of law: professional, political or traditional.[97] In the first system, 'the legal arena is clearly distinguishable from the political arena (…) and the legal process is largely secularized'; moreover, 'high level (political) decision-making is itself subject to the restraints of the law', setting up a 'biunivocal' relationship between law and politics.[98] This process of full autonomy between law and politics has not been fully reached in the second type of legal system listed, which allows the authorities to escape the ordinary rule of law.[99] In the third type of system, the traditional rule of law prevails over the other two and 'the hegemonic pattern of law is either religion or a transcendental philosophy in which the individual's internal dimension and the societal dimension are not

---

[91] Ibid, 19

[92] Ibid, 20 et seq

[93] Ibid, 20

[94] A notable example of harsh criticism to this approach can be found in relation to the harsh criticism presented by Pierre Legrand and 13 others towards H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (4th ed, OUP 2010), available at http://www.pierre-legrand.com/glenn_4.pdf [accessed 17 August 2014]

[95] David and Brierley, *The major Major Legal systems Systems,* 4 et seq

[96] Mattei, 'Three Patterns of Law', 12, citing Max Weber, *On Law in Economy and Society* (Harvard University Press 1954), 16 et seq

[97] Ibid, 12, 16 et seq

[98] Ibid, 23 et seq

[99] Ibid, 27 et seq. To that effect, Mattei quotes from RB Schleisinger et al, *Comparative Law: Cases, Text Materials* (5th ed, 1988 and Supplement 1994): 'when men rather than law govern, people usually find it more prudent to seek a powerful human protector than to stand on legal rights against the State'. This argument is particularly valid in relation to authoritarianism, often marred by corruption and nepotism at all levels, that preceded the Arab Spring events

separated'.[100] Mattei concedes that legal analysis alone is unable to capture the subtle complexities of the links between religion/morality/ethics in that context, and stresses that traditional rule of law systems do not coincide with the spheres of informal law.[101]

The political rule of law model prevails in transitional contexts, to the extent that Mattei explicitly talks of a 'law of development and transition' model.[102] This is characterised by:

> Limited control of state institutions on the society; weak courts; uncontrolled rate of inflation; high level of instability of existing democratic structures, if any; high level of political involvement in the activity of the judiciary; high levels of police coercion; drastic governmental economic regulatory and deregulatory intervention; continuous attempts at major legal reform; legal culture heavily influenced by foreign models and usually marginalized by the political power; scarcity of legal literature; limited distribution of judicial opinions; scarcity of legally trained personnel; and a highly bureaucratized public decision making process.

The transitional/political rule of law system described presents a temporary nature, and seeks to eventually shift towards the rule of professional law model once the transition has been completed.[103] In that regard, Mattei remarks that this type of legal system is also characterised by the competition between the rule of professional law and the rule of traditional law in appropriating the lion's share of the transitional legal setting. In light of the transitional justice/development nexus introduced in the first chapter of this thesis, the balance between competing pulls is likely to play a role in the longer-term restructuring of society.

The tripartite patterns of legal systems set out by Mattei and the explicit mention of transitions suggest that while the rule of politics temporarily prevails, the rule of professional law and the rule of traditional law struggle to project their respective norms in the process. With reference to the localisation of TJ in Muslim-majority settings, a prima facie analysis of the Arab Spring contexts suggests that although political forces dominate the entire process, both the traditional (Islamic) rule of law camp and the professional rule of law camp (inclusive of international law and human rights guarantees) struggle to put themselves in the picture.

3.1 The Contents of Legal Systems: Formants, Cryptotypes and Transplants

As discussed previously, legal systems are not based on a single set of rules upon which a cohesive model is structured.[104] Instead, a variety of legal material, numerous interpretations and conflicting elements suggest that there are multiple 'legal formants' within a given legal system, and 'there is no guarantee that they will be in harmony rather than in conflict'.[105] Legal formants are defined as:

> All those formative elements that make any given rule of law amidst statutes, general propositions, particular definitions, reasons, holdings, etc. All of these formative elements are not necessarily coherent with each other

[100] Ibid, 35 et seq
[101] Ibid, 38
[102] Ibid, 29 et seq
[103] Ibid, 35
[104] Sacco, 'Legal Formants' (Instalment I of II), 21 et seq
[105] Ibid, 23 et seq

> within each system. (…) To the contrary, legal formants are usually conflicting and can better be pictured in a competitive relationship with one another.[106]

According to Sacco's theory, a multitude of facts influence how a scholar or a judge may interpret a legal provision; these include factors extraneous to the law, as well as those norms borrowed and transplanted from elsewhere. The value of the comparative legal method rests in its explicit aim of dismantling the claims of logic and deduction upon which a legal system is based.[107] The competing interpretations and models available, in fact, can all be valid by virtue of their very existence; this is because the 'the comparative method is founded upon the actual observation of the elements at work in a given legal system'.[108]

Sacco argues that there is not a closed set of legal formants in any system (limited to statute/judicial decisions/scholarly writings) and focuses on the varying comparative importance of legal formants in each system.[109] A distinction he does make, however, is between 'those legal formants that are themselves rules of conduct and others that are developed in order to provide abstract formulations or justifications of rules and conduct'.[110] He also distinguishes between 'enacted legal formants' (e.g. in constitutions) and 'those which have grown up without formal enactment'.[111] The dynamic ability to influence other formants will inevitably vary between legal systems, as will the dissonance among formants of a same system.[112] It is in this context that comparative law brings its important contribution to understanding a legal system.

Interpretation of the law is key to its application; Sacco argues that 'whatever affects the convictions of the interpreter [and thus interpretation] is thus a source of law'.[113] This is a fairly radical notion, which distances itself from both positivism and natural law. Legislation must 'somehow be placed on a pedestal' and 'sacralised', understood by those who apply it as 'the product of a great social breakthrough' to gain respect.[114] This is especially important in times of transition, when rules 'break radically with the past after a period of acute social conflict'.[115] This process of sacralisation may also take place when society elevates lawmakers and their entourage to a higher level than the law itself.

Likewise, scholarly writings as a legal formant have 'been regarded as the supreme source of law' in various contexts because the scholar 'guides interpretation' of rules 'in his double role as writer or authoritative works' and teacher.[116] By way of example, Sacco discusses Islamic law, positing that although the *shari'ah* comes from a divine revelation 'that gives legal propositions the air of infallibility', scholarly interpretation fills the gaps when 'the revealed sources do not deal explicitly with all problems' and their meaning is

---

[106] Mauro Bussani and Ugo Mattei, 'The Common Core Approach to the European Private Law' (1997/1998) 3 *Columbia Journal of European Law* 339, 344

[107] Sacco, 'Legal Formants' (Instalment I of II), 24

[108] Ibid, 25

[109] Ibid, 32 et seq

[110] Ibid, 34

[111] Sacco, 'Legal Formants' (Instalment II of II), 344

[112] Sacco, 'Legal Formants' (Instalment I of II), 33

[113] Sacco, 'Legal Formants' (Instalment II of II)', 345

[114] Ibid, 345

[115] Ibid, 346

[116] Ibid, 346 et seq. For an general discussion on the effects of legal scholarship in the UK, Richard Taylor 'Complicity, legal scholarship and the law of unintended consequences' (2009) 29(1) *Legal Studies* 1

uncertain.[117] In this context, scholars (and especially those operating before the 10th century) are recognised as the 'architect[s] of this immense framework of rules', given there is little space accorded to judicial precedent and reasoning; moreover, in Sunni Islamic law and theology, there is no supreme interpretative authority.[118] The scholar's legitimacy in Islamic law, thus, is linked to the fact that the source form which he performs exegesis is assumed to be of divine nature.[119] Even when the nationalisation of law limits the scholar's capacity to create law, scholarly authority may play an important role in the legal system. For example, in Egypt, the Grand Sheykh of Al-Azhar, the leading scholarly institution in sunni Islam, is held in high esteem among the secular institutions of the state (also for political motivations), and has played an important role in the public debate around the law.[120] The role of Al-Azhar in the Egyptian transition will be discussed in greater detail in the following chapter.

In a legal system not all legal formants are explicitly formulated.[121] There are numerous implicit, non-verbalised rules and patterns, which may diverge from 'the explicit formulations of a system', and have outward effects, which are termed 'cryptotypes' by Sacco.[122] According to this theory, the more general a cryptotype, the harder it is to identify; Sacco notes that, at times, 'they may form the conceptual framework for the whole system'.[123] He talks about the 'mentality' of jurists of given countries as linked to contextual cryptotypes,[124] and the 'cultural baggage' of judges – and presumably, of all lawyers.[125] An example of this could be the Turkish legal system, which is formally secular, but embedded in the social and political realities of a Muslim-majority community that inevitably shapes the interpretation of the positive secular laws enacted by the state.[126]

'Mute law' coexists with, and tends to be overshadowed by, spoken (i.e. explicit) legal sources.[127] Thus, unspoken elements that contribute to a legal system, such as cryptotypes, are especially hard to grasp for lawyers, who may have to draw from cognate disciplines to further their knowledge of a given legal system – as discussed previously in this chapter. Indeed, 'comparative law thus becomes a go-between between legal scholarship and history, and between legal scholarship and general legal theory'.[128] Sacco identifies the survival of certain legal rules 'because they do not represent any value, do not correspond to any ideology,

---

[117] Sacco 'Legal Formants (Instalment II of II)', 347 et seq

[118] Ibid, 348

[119] Ibid

[120] See Nathan J Brown, *Post-Revolutionary Al-Azhar* (Carnegie Endowment for International Peace, Middle East, 2011), 5

[121] Sacco,'Legal Formants (Instalment II of II)' , 385 et seq

[122] Ibid

[123] Ibid, 386

[124] Ibid, 387

[125] Sacco, 'One Hundred Years of Comparative Law', 1171

[126] On the effects of a Muslim-majority population in the secular state and law, see AA An-Na'im, *Islam and the secular state: negotiating the future of Shari'a* (Harvard University Press 2008), 182 et seq: 'The Islamic identity of Turkey is rooted in its culture, tradition, and the religious affiliation of the vast majority of its population, while the secular nature of the state is entrenched in its constitution'

[127] Sacco, 'Mute Law', 465 et seq

[128] Sacco, 'Legal Formants (Instalment II of II)', 389

[129] Ibid, 392

are foreign to any moral systems and respond to an elementary necessity of social organization'.[129] To that effect, he takes the prohibition of murder as an example valid in both capitalist and socialist contexts.

That example, however, is not satisfactory. Homicide may be in fact lawful in a number of settings, whereas in others it may amount to murder; for instance, ritual human sacrifices, state-administered executions, private revenge in which the family of the victim execute the perpetrator, targeted killings in the context of the war on terror, death in police custody as a result of enhanced forms of interrogation, killings in the context of armed conflict, are all shielded by some sort of formal or informal legality, social acceptance, or indeed inability of those who disagree to counter the self-sustaining structures of a society that promote a certain view. In that sense, Sacco's views seem to be naive, or at least out of tune with literature on 'social dominance theory'.[130] This is perhaps the core unresolved flaw of Sacco's otherwise valid theory: by presenting itself as a neutral interpretative lens to identify the formants of a system, his analysis fails to recognise the deep-rooted structural imbalances that underpin all societies and consequently their laws. Mindful of this shortcoming, his approach can be reclaimed by ensuring a critical angle to what comparative law does.

Against this backdrop, the cryptotypes that underpin a legal system are intimately linked with the prevailing social structures and patterns of inequality and marginalisation in society. The role of positive law in that regard may be duplicitous: one the one hand, enacted laws may both shield and be shielded by certain negative practices that determine the cryptotype; on the other, the law (e.g. constitutional principles, human rights, the protection of cultural heritage, etc.) may provide the very tools to bring about positive change, that may contribute to minimising or eradicating the effects of an 'unethical' cryptotype (e.g. social norms condoning domestic violence towards dependants, or positive social attitudes towards state-administered capital punishment). In the context of TJ, (newly) enacted law may carry this transformative potential, facilitating a break with an illiberal past. In light of this discussion, an ethical appraisal of cryptotypes may be necessary in certain settings, provided it is conducted by the comparative lawyer in a manner which is appropriate to her role and according to the tools provided cognate disciplines such as philosophy and criminology.

A further typology of legal formants to take into account in a system is the process of borrowing and imitation, which contributes to 'the course of legal change'.[131] Borrowing can happen for a number of reasons at legislative level, by judges and of course through the work of scholars. Much attention has been dedicated to the phenomenon of legal borrowing in the comparative law literature, generally in relation to the reception of foreign law across domestic jurisdictions.[132] The following section will address the extent to

---

[130] See, inter alia: Michael Mitchell and Jim Sidanius, 'Social Hierarchy and the Death Penalty: A Social Dominance Perspective' (1995) 16(3) *Political Psychology*, 591. Sacco himself, in 'Mute Law', indirectly revises his earlier approach in his discussion of subordination and loyalty and the law.

[131] Sacco, 'Legal Formants (Instalment II of II)', 394 et seq

[132] See *inter alia* Watson, *Legal transplants,* and A Watson, 'Aspects of reception of law' (1996) *American Journal of Comparative Law* 335; William Ewald, 'Comparative jurisprudence (II): the logic of legal transplants' (1995) *American Journal of Comparative Law* (1995), 489; Eric Stein, 'Uses, Misuses – and Nonuses of Comparative Law' (1977) 72 *Nw UL Rev* 198

which the international paradigm of TJ may borrow from Islamic jurisprudence in order to acquire additional relevance in Muslim-majority settings.

Tacking stock of the discussion, the main contribution of comparative law to the relocation of transitional justice from international law to Muslim-majority settings is the attention it affords to the hidden normative forces that define a legal system. As such, comparative lawyers engage more readily with other disciplines than their international colleagues, enriching their understanding of a given context through an appraisal of its formants and cryptotypes as well as transplanted normative material. With reference to TJ, which is characterised by transformative legal uncertainties, comparative methods can assist international lawyers looking for local normative principles to complement global rules, when domestic law is inadequate for the purpose of transition. Mindful of the structural inequalities that may be perpetuated by legal formants and cryptotypes, international law approaches to transitional justice may find a valuable ally in comparative law's ability to see more effectively (and strategically, from a political angle) into the legal systems of countries undergoing transition.

4. International Law as a Cross-cultural Bridge for Transitional Justice

Comparative legal analysis has been of great use in developing cognate disciplines, including PIL and IHRL. For instance, the 'general principles of law recognised by civilised nations' as a source of international law under Article 38 of the ICJ Statute can be discovered and elucidated by the employment of comparative law methods,[133] relevant also to the Rome Statute of the ICC (although the actual use of comparative law by that Court beyond civil/common law is limited).[134]

From a functionalist angle, the aims of comparative law include supporting lawmakers in finding and developing solutions, interpreting existing (national) laws, educating legal professionals more broadly and unifying law at the international level, by inducing national legal systems 'to adopt common principles of law'.[135] Indeed, comparative law supports the development and determines the direction of international law. The emergence of the right to the truth as a cornerstone of transitional justice through the comparative appraisal of legal developments to that effect in the Inter-American and European human rights systems and elsewhere, as discussed in chapter 3, illustrates as much.

Some comparative law scholars have also suggested that PIL and the work of the United Nations, including international conventions, may help bridge the gaps between different legal systems.[136] These propositions indicate that the relationship between comparative law and PIL is twofold: on the one hand, comparative law assists with the recognition of a common set of basic principles that are in turn reflected in international law. To that effect, it has been noted that 'when international laws are drafted based on legal concepts that already exist at the domestic level, the latter can be helpful for the interpretation of the former'.[137] On the other hand, the divergence of legal systems described in comparative analysis can be somewhat harmonised under the overarching influence of PIL.

David Kennedy notably discusses the relationship between international and comparative law, whereby the former focuses on a 'universal claim or project' aimed at 'governing' whereas the latter concerns itself more with 'understanding'.[138] He looks at comparative law 'from the standpoint of [the] internationalist governance project' and considers comparativists 'as legal specialists in difference, play in the broader international project of public and private governance'.[139] Instead, for international lawyers 'law and culture inhabit different frames', 'culture' is neatly equated with the nation, and is problematic whenever it is not.[140] In essence, while the comparativist is sceptical yet tempted by governance, the internationalist feels the same

---

[133] Zweigert and Kötz, *An Introduction to Comparative Law*, 7 et seq. Reference to Art 38 ICJ Statute is also made in David and Brierley, *The Major Legal Systems*, 9 et seq.

[134] Mathias Siems, *Comparative Law* (CUP 2014), 225. See Art 21 (1)(c) of the Rome Statute of the ICC

[135] Zweigert and Kötz, *An Introduction to Comparative Law*, 13 et seq, 24

[136] Sacco, 'Legal Formants (Instalment I of II)', 6

[137] Siems, *Comparative Law,*224

[138] David Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance', (1997) *Utah Law Review* 545, 548. Some of the themes presented in Kennedy's 1997 work were further discussed in David Kennedy, 'The methods and the politics', in Legrand and Munday *Comparative Legal Studies*, 345 et seq

[139] Ibid, 551

[140] Ibid, 552 et seq

way about culture, and each discipline sees the other as 'politics'.[141] Kennedy identifies that 'critical traditions exist in both' and that enhancing the dialogue between the two would be fruitful.[142] In principle, PIL is well equipped to respond to comparative law in a global sense (especially in identifying general principles of law); in practice, however, the dominance of 'intra-western' debates between civil and common law, teamed with political hegemonies of the west in international relations, have marginalised other legal traditions on the international plane. For the moment, it seems that other areas of international regulation (notably, finance) have been more responsive to global geographies.[143]

The international legal system is based on a wider range of norms than the discrete package of enacted law; from a comparative angle (borrowing from Sacco), the sources of PIL are not just the legally-binding legal formants. Soft law constitutes an important part of the international normative framework and is a fertile ground for legal developments.[144] Though international law is conceptually distinct from domestic jurisdictions, in terms of comparative law it can be viewed as just another legal system which can be analysed and evaluated in relation to others. Comparative law may play an important part in contributing to soft law advancements, which may then acquire a binding nature over time. With reference to TJ, this potential is especially useful.

Given the 'indivisibility of the local and international dimensions of transitional justice', comparative law can operate as a shuttle between the global and the various particular applications of TJ that in turn feed back into the global.[145] Moreover, living in the 'steady state of transitional justice', normalised in permanent institutions set out under international law, such as the ICC,[146] that can potentially embed comparative law in their work, comparative analysis could become routine in developing and consolidating the global paradigm of TJ.

A further argument in favour of embedding TJ as defined internationally in comparative law is linked to the role of human rights. The globalisation of human rights has enabled their diffusion through transplants through the international organisations that seek to promote them.[147] As such, a 'global ethic and a dialogical human rights discourse' have been identified as the way forward to avoid 'one-sided transplants of 'Western' human rights', employing comparative law constructively to further the universal aims of basic rights in a multitude of cultural settings.[148]

International jurisprudence (including case law analysis) on human rights topics can reveal emerging patterns of human rights throughout different settings. Commenting on the engagement of foreign law regarding the death penalty in courts around the world, Carrozza found that the notion and 'globally recognisable

---

[141] Ibid, 557 et seq

[142] Ibid, 559-62

[143] As background, see Jane Pollard, and Michael Samers 'Islamic banking and finance: postcolonial political economy and the decentring of economic geography' (2007) 32(3) *Transactions of the Institute of British Geographers* 313

[144] CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly*, 850

[145] Viaene and Brems, 'Transitional justice and cultural contexts', 215

[146] Teitel, 'Transitional Justice Genealogy' 89 et seq

[147] Siems, *Comparative Law,* 214 et seq

[148] Ibid, 217

language' of human dignity was a unifying aspect in the arguments accepted against this practice.[149] The explanation of the reliance on foreign law in relation to human rights goes beyond functionalist attitudes. Calling for a *jus commune* of human rights (alongside conventional IHRL), he argues that cross-cultural communication based on human dignity fosters a 'deeper and more genuine universality' in which common principles adapt to different local settings.[150] In light of this analysis, the development of TJ seems both flexible enough to accommodate local differences and yet maintain the universal tenets of human rights and dignity underpinning IHRL. On the basis of Carrozza's general proposal for human rights, a *jus commune* for TJ could be envisaged which accommodates and includes PIL as well as local norms.

Linked to the concept of *jus commune*, a global framework of TJ, predicated on international law and yet allowing room for domestic and local norms as well as cultural resonance, could be framed in relation to the notion of *jus gentium*: international law understood as the law of nations. Jeremy Waldron suggests that *jus gentium* carries a broader meaning than international law proper (*jus inter gentes*) as it is:

> Available to lawmakers and judges as an established body of legal insight, reminding them that their particular problem has been confronted before and that they, like scientists, should try to think it through in the company of those who have already dealt with it.[151]

In that sense, the overlap with the functionalist method as one of the possible purposes of comparative law is apparent. The definition of *jus gentium* as a 'law of nations in the more comprehensive sense – a body of law purporting to represent what various domestic legal systems share in the way of common answers to common problems' is separate from natural law and looks at 'what law ha[s] actually achieved in the world'.[152] In that sense, it reflects some of the ideas on the practical subject-matter comparative enquiry presented by Sacco in the previous section.

Although Waldron writes specifically in relation to American courts looking at foreign law,[153] his arguments could be adopted in the context of the design and development of TJ initiatives which are not *a priori* blind to 'foreign' law, and can accommodate multiple normative forces. In support of a sustained engagement with experiences tested elsewhere, Waldron contends that *jus gentium* offers:

> The accumulated wisdom of the world on rights and justice. The knowledge is accumulated not from the musings of philosophers in their attics but from the decisions of judges and lawmakers grappling with real problems. And it was "accumulated" not just in the crude sense of one thing adding to another, but in the sense of overlap, duplication, mutual elaboration, and the checking and rechecking of results that us characteristic of true science. Jus gentium, conceived this way, is no guarantor of truth: a consensus in either the law or the natural sciences can be wrong. In neither field, however, is there a sensible alternative to paying attention to the established body of findings to which others have contributed over the years.[154]

---

[149] Paolo Carozza, ''My Friend is a Stranger': The Death Penalty and the Global Ius Commune of Human Rights' (2003) 81 *Texas Law Review* 1031, 1079

[150] Ibid, 1084 et seq

[151] Jeremy Waldron, 'Foreign Law and the Modern Jus Gentium' (2005) 119(1) *Harvard Law Review* 129, 132 et seq

[152] Ibid, 133-4

[153] Ibid, citing in footnote 66, *inter alia*, the phrase 'foreign moods, fads and fashions' by Thomas, J in *Foster v Florida*, 537, US 990, 990 n. 1 (2002)

[154] Ibid, 138 et seq

Conversely, he argues that 'to ignore foreign solutions, or to refrain from attending to them because they are foreign, betokens not just an objectionable parochialism, but an obtuseness as to the nature of the problems we face.[155]

In non-transitional societies, domestic legal puritanism is short-sighted; but in transitional settings, defending fiercely vernacular attitudes towards indigenous justice may be impossible, given that the previous legal system ultimately permitted an intolerable degree of violence. Moreover, recent experiences of legal cooperation indicate that dialogue on best practices in TJ is commonplace. For instance, Libyan delegations have attended meetings in Kosovo to discuss disarmament, demobilization and reintegration (DDR) solutions, with a view to learning from best practice in another Muslim-majority transitional society.[156] Likewise, the official proponents of the draft TJ law for Egypt[157] have, equally, sought to consult with foreign lawyers, academics and policymakers with experience of transitional justice to discuss the aims, legal framework and challenges of this type of process.[158] Conversations with Egyptian officials involved in the tentative design of TJ mechanisms for the country have also illustrated awareness and interest in foreign experiences as disparate as the South African TRC, the experience of Sierra Leone, and the case law of the Inter-American Court of Human Rights.[159]

Yet, still in relation to the Egyptian transition, Reem Abou-El-Fadl argues that external interventions in TJ initiatives have not yielded desired results (for a lack of political will), recommending instead 'indigenous alternatives to foreign models'.[160] She identifies the asymmetries inherited from the Nuremberg model as a key limitation for TJ[161] – especially when external factors and actors influence the process.

To this critique, one could add the complexities of employing human rights discourse as the underlying philosophy of transitional justice; human rights might be 'part of the problem' (for many of the reasons listed by David Kennedy on human rights in general[162]) of TJ itself, regardless of whether the model is purely indigenous (state-led or community-led), or an international imposition, or a mixture. This is because human rights may impose limitations to what can be dealt with as part of the transitional process, as discussed in chapters 1 and 2.

---

[155] Ibid, 144

[156] For coverage, http://wac.gov.ly/mod/index.php?option=com_content&view=article&id=80:delegates-from-the-wac-to-the-republic&catid=1:latest-news&Itemid=57 [accessed 17 May 2013]

[157] For coverage, *inter alia*, see http://www.dailynewsegypt.com/2013/04/03/nsf-calls-for-transitional-justice-law and http://carnegieendowment.org/sada/2013/03/19/and-justice-for-all/frm9 (accessed 17 May 2013)

[158] On this matter, the author acknowledges the conversations with Judge Adel Maged of the Egyptian Court of Cassation, who was part of the drafting efforts of the TJ law for Egypt

[159] Ibid

[160] Reem Abou-El-Fadl, 'Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will' (2012) 6 *IJTJ* 318, 320, citing Laurel E Fletcher and Harvey M Weinstein, 'Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective' (2009) 31(1) *HRQ* 163

[161] Ibid, 320-1, citing Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29(2) *Third World Quarterly* 282

[162] David Kennedy, 'International Human Rights Movement: Part of the Problem?' (2002) 15 Harv Hum Rts J 101 writes at 115-6 on this point and links it to (generic) transitions: 'The Western/liberal character of human rights exacts particular costs when it intersects with the highly structured and unequal relations between the modern West and everyone else. Whatever the limits of modernization in the West, the form of modernization promoted by the human rights movement in third world societies is too often based only on a fantasy about the modern/liberal/capitalist west'

The real question for the purposes of this study, however, focuses on whether, and how, transitional justice as set out in international law can be responsive to the aspirations of beneficiary Muslim-majority societies. In relation to the countries involved in the Arab Uprisings, the localisation of the international paradigm of TJ necessarily engages the topic of Islamic law and jurisprudence, which together constitute a legal formant of all the Middle East and North Africa countries. In light of the foregoing discussion, the conceptualisation of TJ initiatives in relation to a given setting can be enriched by comparative law approaches which capture the nuance of relevant legal formants and which, cumulatively, reflect prevailing cultural understandings of justice and law. As such, when faced with Muslim-majority legal systems, TJ must be sensitive not only to enacted laws, but also to the intangible normative principles that underpin a society. By reinterpreting international law from a critical comparative perspective, local rules may reveal themselves as more responsive (but not subjected) to developing common global principles of transitional justice (such as the right to the truth) as well as contributing to the creation of international norms themselves.

4.1 The Challenges of Giving Transitional Justice an Islamic Flavour

Transitional justice as localised in Islamic settings will, most probably, embed legal formants derived from Islamic law and jurisprudence. Before exploring Islamic law in more detail in the next chapter, some preliminary considerations as to the challenges involved in localising international understandings of TJ in legal systems influenced directly and indirectly by forms of religious law are worth exploring. To this end, it is useful to recall Mattei's description of the three main types of legal systems; all of the countries experiencing the Arab Spring and related initiatives of TJ fall in the category of transitional rule of law, which is predominantly based on the supremacy of politics, in which the professional rule of law (including norms based on international law) and the traditional (including religious) rule of law struggle to acquire greater influence.

Mashood Baderin contributes to the debate as to how international law and religion may interact, offering some useful tools for comparative lawyers.[163] He argues that 'religion is like a double-edged sword that could be utilised either positively or negatively in its relationship with international law'.[164] Accordingly, the comparisons and interactions between international law and Islamic law should not be approached disingenuously (through either a separationist or an accommodationist approach): Islamic law can be used in various ways – constructive as well as destructive – in relation to international law, and the conscientious comparativist should bear this in mind.

The potential distinction between 'ordinary' TJ and 'Islamic' TJ remains unclear, though the interest in developing a *shari'ah*-derived model of transitional justice is gaining visibility, especially in the aftermath of the Arab Uprisings.[165] Nevertheless, the concern with developing an Islamic form of TJ does not fall within the stated aims of this thesis; instead, this study is concerned with the extent to which TJ as understood in international law can be translated into Islamic settings and the modalities of this. Moreover, an Islamic

---

[163] Mashood Baderin, 'Religion and International Law: Friends or Foes?' (2009) 5 *European Human Rights Law Review* 637

[164] Ibid, 649

[165] This author has been asked in many occasions whether her research will be able to frame or develop an 'Islamic' conception of transitional justice by both scholars of international/human rights law as well as of Islamic law (Muslim and non-Muslim).

model of TJ would be as impractical as a model rigidly predicated on international law: TJ must retain its inherent flexibility and ability to adapt to each practical application it may face on a case by case basis. Instead, a study of the methods and approaches to localization, as well as of the key features of Islamic legal systems in relation to IHRL, form the basis for the adaptation of TJ to the described settings.

Here, the expression 'Islamic legal tradition' is used to indicate the body of law, legal practice and established legal scholarship encompassing the traditional revealed sources and supplementary sources of Islamic law, as well as legal methods, discussed in greater detail in the following chapter. 'Islamic legal settings' denotes instead a broader context in which Islamic law and jurisprudence play a central role in an existing legal system, whereas the (preferred) phrase 'Muslim-majority legal system' more accurately describes legal systems of communities where the majority of the population identifies as Muslim, shifting the focus away from the formal state-declared religion to the spiritual identities of its citizens.[166] Given the in(de)finite connotations of the terms *shari'ah* and 'Islamic law', the variety within what is generally denoted as 'Islamic law' (e.g. between the Sunni and Shia branches, and within the two) and the reality of the legal systems of Muslim-majority countries that present mixed systems (i.e. not solely derived from Islamic tenets), the expression 'Islamic legal tradition' seems to be a more appropriate choice of descriptor then 'Islamic law'. However, it must be noted that as these normative practices have evolved and have become incorporated into various legal systems they have enjoyed constant scholarly reinterpretations; thus, their 'traditional' label should be understood with a pinch of scepticism, paving the way for novel readings to suit current (and transitional) needs. For these reasons, comparative lawyers should not misconstrue the Islamic label often used to designate merely the positive laws of self-declared Islamic states (such as Saudi Arabia or Iran) or of Muslim-majority communities: these norms are the outcome of 'ordinary' political processes of a given historical and geographic context which interprets what is 'Islamic'. As such it is likely that the 'Islamic' label is used strategically and (to a degree) ingenuously to shield political interests.

What does this mean for giving transitional justice an Islamic flavour? The following list expresses a few unresolved concerns. Firstly, as mentioned, the 'Islamic' element may be employed as a conventional label for political gain and populist gratification. This means that the social force of the Islamic label – unchallenged and unchallengeable as 'divine', thus a potent political tool for oppression – is heightened and especially problematic where it promotes aims that do not match international human rights standards. Secondly, as a corollary of the first point, the 'Islamic' element may be based on contentious exegesis, to serve political interests, and may operate *ultra vires* or even *contra legum* (especially in terms of women's rights, the punishment of *hudud* crimes, etc.). Regardless of whether this is acceptable or not for orthodox Islamic law scholars, the risks of political pollution are increased. However, the opposite argument could be made, inasmuch as progressive exegesis is made to meet IHRL. This remains a question for each TJ context and participants that cannot be fixed a priori in theoretical terms. Thirdly, following from the second point, the normative foundations available in the traditional sources of Islamic law are likely to be insufficient, given that they refer back to a dated stage of jurisprudence. Thus, it may be artificial to seek useful elements for contemporary transitional justice in old ideas about law.

---

[166] On this point see inter alia Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order* (Hart 2005), 26 et seq

Nonetheless, the study of the synergies between principles of the Islamic legal tradition and the objectives of TJ is necessary for both theoretical and practical purposes. A critical comparative study of the two systems will help localise international/human rights conceptions of TJ in Muslim-majority settings, and efforts to widen relevant sources to incorporate Islamic law would strengthen the jurisprudence of transitional justice as well as its implementation in Muslim-majority legal systems. Moreover, the diversification of authorities for TJ is likely to consolidate its standing as a more truly global set of rules under international law, developing its own form of *jus gentium*. Proponents of legal purism – either in international law or in Islamic law – are, however, likely to be critical of this approach. They may reject the indefinite range of sources considered in the critical comparative approach to relocating TJ from international law to Muslim-majority legal settings, or even be repelled by the pollution between the two systems. Yet the pressing realities of the resurgence of political Islam as *realpolitik* in Tunisia, Egypt and Libya, as well as the doctrinal potential of critically using international law and Islamic jurisprudence in synergy for transitional aims (discussed in chapters 5 and 6) renders their reticence untenable. As such, a critically constructive comparative approach to TJ may engage fully and frankly with the Islamic law formants (and cryptotypes) of Muslim-majority legal systems.

In essence, comparative law carries the potential to inform and advance international law, including soft law, which in turn frames transitional justice processes. The analysis of the emerging right to the truth in the previous chapter provided an example of this. Drawing from notions of *jus commune* and *jus gentium* discussed in existing literature, comparative law is able to contribute to the establishment of international law of global applicability and local resonance across societies – in a way that is likely to inform the global paradigm of TJ as well. This leads to the creative uses of comparative law in drawing on various legal systems to construct rules of international significance. With regards to relocating TJ from international law to Muslim-majority legal systems, comparative law may reveal how PIL and Islamic law (as a formant of Muslim-majority legal systems undergoing transition) cross-fertilise, thus strengthening the normative framework both in its abstract global dimension and in its local applications.

5. Conclusions

This chapter analyses some of the challenges faced by international lawyers seeking to localise transitional justice in general, with an eye to the Muslim-majority legal systems of the Arab Uprisings (discussed in chapters 5 and 6). By identifying that conceptions of transitional justice predicated on international/human rights law also face the universality v relativism debate, two main conclusions can be drawn: firstly, international lawyers engaging in comparative analysis trying to adapt the international paradigm of TJ to local (e.g. Muslim-majority) contexts should carefully consider the starting point of their own legal cultural perspectives. Secondly, the notion of TJ embedded in international/human rights law is more flexible than what is generally perceived and capable not only of being embedded into a specific context characterised by normatively different and diverse elements (domestic/traditional/religious) but also capable of actively embedding a diversity of sources at its core. Against this backdrop, the possibility of studying the localisation of TJ based on international/human rights law to the Muslim-majority contexts of the Arab Spring calls for an open, frank and constructive reckoning with Islamic legal traditions (in subsequent chapters). Comparative law, given its focus on understanding the complex workings of legal systems as opposed to only finding solutions to problems, is suited to the critical study of local settings in which (international) transitional justice may be localised.

In that regard, the international lawyer approaching TJ in relation to the Arab Uprisings has the chance of becoming a conscientious comparativist. Given the complexities of analysing Islamic law vis-à-vis international/human rights law and standards, the international lawyer engages with another normative tradition and culture, partly religious, partly doctrinal, probably state-controlled. In doing so, a critical dialogue between coexisting norms helps the pursuit of the transitional aims of accountability, justice and reconciliation. By using comparative law strategically, international lawyers can add to the developing *jus commune/jus gentium* of transitional justice. Indeed, just as the South African TRC, the case law of the inter-American Human Rights Court, the decisions of the Bosnian special War Crimes Chamber, the literature on the *gacaca* in Rwanda, etc. have all become *topoi* of global understandings of transitional justice, there may be interesting lessons to be taken from TJ conceptions and experiences of Muslim-majority legal systems. As such, TJ ideas developed in connection to Islamic jurisprudence and practice may contribute, though a critical, conscientious and pragmatic comparative approach, to the further global development of the discipline, enriching the global paradigm of transitional justice.

In light of the perspectives and critiques set out in comparative law, the following chapters of this thesis will seek to analyse the notion of Islamic legal systems, and whether they are capable of receiving and appropriating some of the core elements of transitional justice outlined in the first half of this thesis – as well as contributing constructively to the consolidation of the *jus gentium/jus commune* of transitional justice (its emerging global paradigm).

V. Formants of Contemporary Muslim-Majority Legal Systems

1. Introduction

Following the overturn of authoritarian regimes in Arab countries with a Muslim-majority population such as Tunisia, Egypt and Libya, there is a pressing need to critically discuss the role of Islamic law in relation to TJ. In the context of the revival of political Islam in North African transitions and in light of the influence religion exercises on societies and legal systems, the international paradigm of TJ is likely to encounter Islamic law. Having outlined in the previous chapter some of the challenges faced by international lawyers seeking to localise TJ, the analysis can move on to the specificities of Islamic settings – called here Muslim-majority legal systems – where the *shari'ah* carries a distinctive normative force.[1]

The aim of this chapter is to explore how Islamic jurisprudence influences contemporary legal settings, organically and through the activities of institutions and individuals who exert agency over the legal system. For the purpose of this thesis, Islamic law and the Islamic legal tradition are dealt with not as a universal, static, religiously mandated normative system, akin to an expression of natural law which cannot accommodate internal variations. That position is easily rebutted by the diversity and doctrinal variety within Islamic law.[2] Equally, Islamic law cannot be understood as a purely political project contingent to the context of early Islam: this would ignore the pull that it exercises on many religious people who seek to live by the principles of divine revelation, including lawmakers of Muslim-majority settings.[3] Instead, Islamic law is understood here as a legal formant of Muslim-majority legal systems, informing both human behaviour and lawmaking activities. As such it may manifest itself through a variety of means identifiable through the comparative law methods discussed in the previous chapter.

This chapter discusses some of the elements that make up Muslim-majority legal systems and evaluates the role of the actors that shape those systems through religious arguments. The first part draws on existing literature to introduce Islamic law and its sources. The second part outlines the evolutions and applications of Islamic law, its social function, as well as the process of radical reinterpretation of the divine sources and the possibilities of modernism, considering a contemporary TJ example from the Arab Uprisings. The third part will analyse the relationship between international law and Islamic law, setting the scene for the final chapter of this thesis, which addresses the possibilities offered by Islamic law in furthering transitional justice. In the broader context of the research questions, this chapter critically discusses the elements that make up Muslim-majority legal settings and considers the function of Islamic law before moving on to how the key elements of TJ can be localised accordingly.

---

[1] On the normative force of *shari'ah* see Baudouin Dupret, 'La sharî'a comme référent législatif' (1995) 34 *Revue interdisciplinaire d'études juridiques* 99

[2] See for example, Reem Meshal, 'Antagonistic Sharīʿas and the Construction of Orthodoxy in Sixteenth-Century Ottoman Cairo' (2010) 21(2) *Journal of Islamic Studies* 183 for a useful account of internal fractures in Islamic law

[3] See on this point: J. N. D. Anderson, 'The significance of Islamic Law in the World today' (1960) 9(2) *American Journal of Comparative Law* 187

2. Muslim-majority Legal Systems and Islamic Law

The legal systems of Muslim-majority societies are typically informed, either directly or indirectly, by religious norms that guide a population's spiritual beliefs and social interactions. In the context of human relationships – horizontally between equal citizens or vertically between individuals and groups in uneven power structures – the normative effects of faith acquire a fundamentally secular purpose. As such, Islam may provide sacred justifications for the very earthly pursuit of regulating human behaviours and interactions, both at an abstract level and in formal legal documents. This is not dissimilar from the impact that any given religion may have in a secular context, such as Christianity in national and regional European jurisdictions.[4] That being said, religion is unlikely to be the only driving rationale for lawmaking, given the mundane (and far from spiritual) reality of politics. As noted in the previous chapter, in order to grasp the impact of religion in legal systems, sacred norms should be also seen as carrying an intently secular function – at least for academic purposes. This section will explore this proposition further in relation to Muslim-majority legal systems and, relatedly, contextualise Islamic law (*shari'ah*).

It may be tempting to describe a Muslim-majority legal system that coincides with a state whose citizens are for the most part Muslim as 'an Islamic state' predicated on *shari'ah*. This invitation has been convincingly refused in An-Na'im's work on the relationship between Islamic law and the secular state.[5] Opposing the notion of a self-styled Muslim state allegedly based primarily on the Islamic tradition, he argues that Islamic law, as understood by the elected representatives and civil society of a state, will find its natural place in the positive laws of a 'neutral' legal setting.[6] In other words, a secular state would be able to accommodate core values associated with Islamic law as a legal formant of the system, in a variety of ways that reflect the identity and wishes of its society (and not as a rather unpalatable top-down political imposition). In light of the tools of comparative law explored in the previous chapter, Muslim-majority legal systems will be influenced, not determined, by Islamic law. And this proposition is value-free, as long as human rights principles enjoy a status equal to Islamic law principles.

On this topic more generally, Habermas remarks that the 'religious citizen' 'no longer lives as a member of a religiously homogeneous population within a religiously legitimated state'; instead, the 'certainties of faith are always already networked with fallible beliefs of a secular nature; they have long since lost (…) their purported immunity to the impositions of modern reflexivity'.[7] So, as far as the specific topic of this thesis is concerned, the two authors cited point in the same direction: to talk of an 'Islamic state' for a Muslim

---

[4] European examples of religious invocations in support of constitutions include the Preamble of the Irish Constitution that reads "In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred" and "Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ", available at http://www.irishstatutebook.ie/en/constitution/ [accessed 2 January 2015]. Even at regional EU level there has been a heated debate around the (non) inclusion of a formal reference to the Christian heritage of Europe; see inter alia Weiler, Joseph HH, et al. *Un'Europa cristiana: un saggio esplorativo* (Bureau 2003); Ronan McCrea, 'Religion as a Basis of Law in the Public Order of the European Union' (2009) 16 *Colum. J. Eur. L.* 81. From a regional human rights perspective on the role of religion in the jurisdiction of the ECHR, see inter alia Ian Leigh and Rex Ahdar, 'Post−Secularism and the European Court of Human Rights: Or How God Never Really Went Away' (2012) 75(6) *MLR* 1064

[5] Abdullahi Ahmed An-Na'im, *Islam and the secular state: Negotiating the future of Sharia* (Harvard University Press 2009)

[6] Ibid

[7] Jürgen Habermas, 'Religion in the public sphere' (2006) 14(1) *European journal of philosophy* 1, 9, also drawing from John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) *University of Chicago Law Review*, 765

population emanating an Islamic legal system based solely on Islamic law is a mere chimera. Historical support for this statement can be found in the coexistence of *shari'ah* and *qanun* (religious law and secular law) throughout the Ottoman Empire – indicating that reliance on Islamic law was not sufficient for the operations of a legal system.[8] An alternative stance based on a joint reading of An-Na'im and Habermas, could be the following: if the majority of citizens of a state (or, more broadly, society) are Muslim and participate in the public sphere (including lawmaking processes) on the basis of their faith-based ideals (among other convictions), there may well be an 'Islamic' colour to the legal system, which does not however override the secular dynamics of politics and power that ultimately determine legal systems. Presuming the primacy of all things Islamic in Muslim-majority systems today would create a 'fantasy effect' which fails to take into account the extent of non-Islamic law in those settings (including legal transplants from the west).[9] Lama Abu Odeh rightly warns that:

> Giving Islamic law an overarching status analytically in our approach to law in the Islamic world, distorts our understanding of legal phenomena in these countries.[10]

Nevertheless, it would be impossible to talk about Muslim-majority legal systems without discussing Islamic law, jurisprudence and legal traditions. For the purpose of this thesis, the expression 'Islamic legal tradition' is used self-consciously to indicate the complex body of law, legal practice and established legal scholarship, developed throughout the history of Islam and based on the preservation of continuity, from the earliest jurists to contemporary enquiry expressly following in that vein.[11] The term 'tradition', however, is misleading due to the variations of Islamic law and its current applications to contemporary societies which may pay lip service to a historical religious continuity but in practice simply seek to give a set of very ordinary rules of social control a divine – and thus untouchable – aura. Indeed, realpolitik is likely to use its own interpretation of what constitutes tradition for asserting power.[12] Consequently, nothing should be 'a priori' received as Islamic law just because it is presented as such.

The accepted structure of (sunni) Islamic law illustrated in the paragraphs that follow is to be understood in light of Sacco's scepticism towards established sources. As such, the sources presented here paint only a partial picture of Islamic legal systems, also considering the historical developments of this topic (reviewed afterwards). Nevertheless, the acceptance in society (and endorsement by dominant actors) reaffirms the importance of these sources in understanding the legal systems of Muslim-majority contexts alongside complementary normative forces.

The normative corpus of the Islamic legal tradition is based on the revealed sources of Islamic law, namely, the Qur'an and the Sunna/Hadith (traditions of the the prophet Mohammad), and also the supplementary

---

[8] On this point, see for example Colin Imber, *Ebu's-su'ud: The Islamic Legal Tradition,* (Edinburgh University Press 1997), 24 et seq. On the Ottoman Empire, see inter alia Halil Inalcik, *The Ottoman Empire: 1300-1600* (Hachette 2013); Donald Quataert, *The Ottoman Empire, 1700–1922* (CUP 2008)

[9] Lama Abu-Odeh, 'The Politics of (Mis) recognition: Islamic Law Pedagogy in American Academia' (2004) 52 *American Journal of Comparative Law* 789

[10] Ibid, 823.

[11] On the preservation of continuity see inter alia Noel James Coulson, *A History of Islamic Law* (Edinburgh University Press 1964) 7

[12] See, in general, E. Hobsbawm and T. Ranger (eds), *The Invention of Tradition* (CUP 1983)

sources, namely *ijma'* (juristic consensus) and *qiyas* (legal analogy). It also includes subsidiary legal methods, such as *ijtihad* (legal reasoning), *istihsan* (juristic preference), *istislah* or *maslahah* (welfare/ common good/public interest), *urf* (custom) and *darurah* (necessity).[13] The supplementary sources – which are themselves also methodological approaches – and the subsidiary legal methods are 'products of human reasoning' through which the revealed sources 'could be extended to cover new developments of life'.[14] Therefore, the phrase 'Islamic legal tradition' can be seen as indicating a sort of Islamic normative *acquis* (borrowing, *mutatis mutandis*, an evocative term from EU law), capturing the rich discourse around Islamic law, encompassing its sources and methods, as well as its tendency to preserve the findings proposed by the classical jurists.

In the development of Islamic law, there has been traced the gradual establishment of four essential attributes:

> (1) The evolution of a complete judiciary, with a fully-fledged court system and law of evidence and procedure;
> (2) The full elaboration of a positive legal doctrine;
> (3) The full emergence of a science of legal methodology and interpretation which reflects, amongst other things, a large measure of hermeneutical, intellectual and juristic self-consciousness;
> (4) The full emergence of the doctrinal legal schools, a cardinal development that in turn presupposes the emergence of various systemic, juristic, educational and practice-based elements.[15]

Wael Hallaq dates these attainments to the middle of the tenth century, referring to subsequent developments as 'accidental attributes' which 'did not affect the constitution of the phenomenon we call Islamic law'.[16] The rise of doctrinal legal schools constitutes, according to Hallaq, the last feature of Islamic law to develop.[17] Each one of these characteristics highlights the predisposition of Islamic law to absorbing secular (i.e. non-revealed) formants contextual to specific times and places. What is particularly striking about this picture is the centrality of human effort in establishing the discipline of Islamic law both theoretically and practically, through the work of judges, lawmakers, scholars and teachers. In the same vein, therefore, one could argue that the four categories of lawyers implied in Hallaq's list of attributes of Islamic law have been (and perhaps still are) the earthly gatekeepers of Islamic law as it is understood today.

The historic duality of theory and practice in the Islamic legal tradition is a central feature of its jurisprudence. In *The Spirit of Islamic Law* Bernard Weiss distinguishes between two parts of classical Muslim jurisprudence: *fiqh*, described as 'practical jurisprudence', which concerns itself with 'the articulation of actual rules of law', and *usul al-fiqh*, described as 'theoretical jurisprudence', 'concerned with questions having to do with the theory of law and the methodological principles governing the formulations

---

[13] For a comprehensive overview and analysis of the sources and methods of Islamic law, see inter alia M. H. Kamali, *Principles of Islamic Jurisprudence, 3rd Edition* (The Islamic Texts Society, Cambridge 2003). See also: M.H. Kamali, *Shari'ah Law: An Introduction* (One World Publications 2008); Wael B. Hallaq, *An Introduction to Islamic Law*, (CUP 2009) and *Shari'a* (CUP 2009); Mathias Rohe, *Islamic Law in Past and Present* (Brill 2015)

[14] M. A. Baderin, *International Human Rights and Islamic Law* (OUP 2003) 37

[15] Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (CUP 2005), 3 et seq

[16] Ibid

[17] Ibid, 5 et seq

of rules of law'.[18] Likewise, for Mohammad Hashim Kamali, *fiqh* is 'the law itself'; *usul al-fiqh* is the methodology of the law and in particular 'the science of the sources and methodology of the law', whereby 'the Qur'an and *Sunnah* constitute the sources and the subject-matter to which the methodology of *usul al-fiqh* is applied'.[19] In describing *usul al-fiqh*, Kamali goes a step further: he identifies a theoretical approach, concerned with 'the exposition of theoretical doctrines', and a pragmatic approach, concerned with 'theory (…) formulated in the light of its application to relevant issues'.[20] All of this complicates the translation of Islamic law into positive norms, which remain distinctively (and openly) intertwined with aspects of theoretical jurisprudence, methods and interpretative tradition. For the purposes of this thesis a clear answer will not be necessary; however, the dynamic and multifaceted nature of Islamic law – which goes beyond strict positive law – provides much potential for the effective localisation of transitional justice from international law to Muslim-majority legal settings, as will be discussed in the final chapter.

2.1 Sources of Islamic Law

Building on the analysis and cautionary notes presented above, the sources of Islamic law are to be understood broadly and interpreted in light of the ongoing dialogue between sacred and secular principles entrenched in Muslim-majority legal settings. From its beginnings, Islamic law was intimately connected to local Arab customary norms.[21] The two commonly recognised branches of Islamic law – '*ibadat* and *mu'amilat* – deal respectively with religious duties and human transactions.[22] As such, in its second meaning, Islamic law has been described as 'a man-made law and has no pretense to being a religious law except that it may be said to lay more emphasis on moral considerations than is usually the case with other legal systems'.[23] Moral considerations that define praiseworthy and blameworthy actions guide the applications of Islamic law.[24] Indeed, the strong ethical component of Islamic law impacts the regulation of human transactions, instead of Islamic ethics being limited merely to guiding the relationship between the individual and divinity. Islamic ethics, therefore, are a key cryptotype of Muslim-majority legal systems in light of Sacco's comparative law theories.

Like other types of religion-based law such as Buddhist law,[25] Jewish law[26] or Canon law,[27] Islamic law has worked its way into society and taken on a contextual meaning which varies across time and space. But

---

[18] Bernard Weiss, *The Spirit of Islamic Law* (University of Georgia Press 1998), xi

[19] Kamali, *Principles of Islamic Jurisprudence,* 1 et seq

[20] Ibid, 9 et seq

[21] On this point see inter alia Majid Khadduri, 'Nature and Sources of Islamic Law (1953) 22 *Geo. Wash. L. Rev.* 3

[22] On this distinction in relation to the (non)religious nature of Islamic law, see Gamal Moursi Badr, 'Islamic Law: Its relation to other legal systems' (1977-1978) 26 *Am. J. Comp. L.* 187, 188

[23] Ibid, 189

[24] Ibid

[25] For interesting examples of Buddhist law in Tibet and China, see inter alia Rebecca R. French, 'A Conversation with Tibetans? Reconsidering the Relationship between Religious Beliefs and Secular Legal Discourse' (2001) 26(1) *Law & Social Inquiry* 95; and 'THE Case of the Missing Discipline: Finding Buddhist Legal Studies' (2004) 52 *Buff. L. Rev* 679. Also, Luke T. Lee, and Whalen W. Lai. 'Chinese Conceptions of Law: Confucian, Legalist, and Buddhist' (1977) 29 *Hastings LJ* 1307

[26] See for example the fascinating history of Jewish religious law presented inter alia in Aharon Shemesh, *Halakhah in the Making* (University of California Press 2009)

[27] On Canon law see inter alia John P. Beal, James A. Coriden and Thomas Joseph Green (eds.) *New commentary on the code of canon law* (Paulist Press, 2000). See also the Code of Canon Law at http://www.vatican.va/archive/ENG1104/_INDEX.HTM [accessed 2 January 2015].

unlike Canon law, Islamic law is not a formal code produced by designated scholars of an organised clergy. Alongside its main sources, the Qur'an and the Sunna, Islamic law has creatively regulated human interaction on the basis of its religious ethics and legal methods mentioned previously.

The classical jurist-theologians agreed that the infallible revelation of the Qur'an were an unquestionable source of law; but, as Khadduri reports:

> Here agreement ended, since the Koran provided no clear guidance for further legislation. As a result, the controversy that followed was essentially one of the sources, rather than the substance, of legislation. The character of this controversy was not, strictly speaking, legal; at bottom it was theological, since an inquiry into what would constitute an authoritative "supplement" to the Koranic revelations is a doctrinal, not a legal argument.[28]

Qur'an

In mainstream interpretations, the Qur'an is the primary and most important source of Islamic law: this divine text constitutes the basis of the religion and according to Muslims it was divinely revealed to the prophet Muhammad through the angel Gabriel.[29] Hinting at the human decision to give effect to the centrality of the holy book as a source of law, Fazur Rahman suggests that the Qur'an 'must be made the primary and indeed the sole director of human life and the source of law', regardless of its relatively small portion of 'strictly legislative' verses.[30] Kamali indicates that out of a total of 6,200 *ayat* (verses) roughly 350 are legal in nature, and were generally revealed in response to practical problems faced by the community.[31] Other authors cite even more conservative figures suggesting only 190 verses (3% of the total) contain legal provisions.[32] But the real question is how to deal with textual uncertainties present in the Qur'an. Kamali distinguishes between definitive text, which is clear, specific and not open to interpretation, and speculative text, which is open to interpretation and *ijtihad,* informed by the overall meaning and purpose of the holy book and the guidance provided in the Sunna (traditions of the prophet).[33] More radical approaches to textual uncertainties – with reference to the change in tone between the verses revealed in Mecca and those transmitted in Medina – have been proposed by Taha and An-Na'im.[34] According to this position, it is possible to extricate the former verses that indicate the immutable corpus of norms, from the latter, revealed at a time of great strife, which are contextual to a historical situation of conflict and uncertainty, and as such may be understood as having a partial application to politically unstable contexts.

Other contentious issues surrounding Qur'anic interpretation include the distinction between literal and metaphorical meanings of the text and the relationship between general principles and specific applications.[35] Kamali argues that 'the Qur'an is specific on matters that are deemed to be unchangeable, but in matters that

---

[28] M. Khadduri, *War and Peace in the Law of Islam* (Johns Hopkins University Press 1955), 54; and also M. Khadduri, 'Islam and the Modern Law of Nations' (1956) 50(2) *AJIL* 358

[29] See the description by Kamali, *Principles of Islamic Jurisprudence*, 18.

[30] Fazur Rahman, *Islam* (2nd Revised edition edition, University of Chicago Press 1979), 68 et seq

[31] Kamali, *Principles of Islamic Jurisprudence*, 26

[32] Badr, 'Islamic Law', 188

[33] Kamali, *Principles of Islamic Jurisprudence*, 27 et seq and 35 et seq

[34] Mahmoud Mohamed Taha, *The second message of Islam* (Syracuse University Press 1987), translated by An-Na'im

[35] Kamali, *Principles of Islamic Jurisprudence*, 35 et seq

are liable to change, it merely lays down general guidelines'.[36] This point remains open to debate if one recalls the socio-historic-geographic context in which the text was delivered, and to what extent the injunctions in the Qur'an are relative to those settings. As such, much of the Qur'anic normative matter is in fact conveyed in general terms, as noted by Kamali, 'which need to be specified in relation to particular issues'.[37] He argues that 'the general in the Qur'an has a value of its own' and provides guidance, validity and 'substance for an ever-continuing series of commentaries and interpretations'.[38] Thus, 'commentators throughout the centuries have attempted to derive a fresh message, a new lesson or a new principle from the Qur'an that was more suitable to the realities of their times and the different phases of development in the life of their community'.[39] Kamali, considered a fairly orthodox contemporary Islamic scholar (but not shy of flexible interpretations), stresses a quintessential feature of the Qur'anic message: the broad principles of the text, generally, facilitate an adaptation of the Islamic message to the specificities of each context.

> The Qur'an itself warns the believers against seeking the regulation of everything by the express terms of divine revelation, as this is likely to lead to rigidity and cumbersome restrictions: 'O you believers, do not keep asking about things which, if they were expounded to you, would become troublesome for you' (5:101).[40]

This analysis suggests that the general principles in the Qur'an are sufficiently flexible to adapt to the aims of transitional justice processes explored in previous chapters of this thesis. Moreover, according to the proposition that 'what the Qur'an has left unregulated is meant to be devised, in accordance with the general objectives of the Lawgiver, through mutual consultation and *ijtihad*',[41] there would be ample scope to explore transitional justice rules in the absence of clear textual injunctions. Thus, it would be possible to develop transitional justice in a manner which, on the one hand, is founded on a secular international legal framework, and on the other, matches the objectives of Islamic law, known as *maqasid as-shari'ah,* discussed below.

Finally, Kamali discusses the function of the purpose/cause of an Islamic injunction.[42] He evaluates whether the existence of a purpose 'gives the *mujtahid* [i.e. the scholar performing ijtihad/independent legal reasoning] the green light to enquire into the causes and reasons behind its injunctions, or whether it exists simply to facilitate a better understanding of the text'.[43] In that regard, he reports that opponents of further enquiry into the rationale of a proposition may consider it an affront to the submission to god. To contrast this position, Kamali reports that the majority of scholars hold that there is not only a possibility but a 'duty to make an effort to identify and implement them'. This is because:

---

[36] Ibid, 39
[37] Ibid, 43
[38] Ibid, 44
[39] Ibid
[40] Ibid, 42
[41] Ibid. On ijtihad, see inter alia Wael B. Hallaq, 'Was the gate of ijtihad closed?' (1984) 16(1) *International Journal of Middle East Studies* 3
[42] Ibid, 46 et seq
[43] Ibid, 49

> Since the realisation of the objectives (maqasid) of the Shari'ah necessitates identification of the cause/ rationale of the *ahkam*, it becomes our duty to discover these in order to be able to pursue the general objectives of the Lawgiver.[44]

Therefore, Kamali states, 'the Qur'an invites the believers to rational enquiry, as opposed to blind imitation, in the acceptance of its messages'.[45] This point is relevant for the purpose of this study, as it stresses the importance of critical analysis of the normative propositions of Islam. Bearing in mind the objectives of Islam, the depth of rational enquiry at theoretical and practical levels enables the exploration of transitional justice principles in Muslim-majority legal settings, to be considered in the next chapter. This enquiry, however, is not only based on the norms contained in the Qur'an: it requires a more dynamic engagement with Islamic law itself as a system made up of legal formants, some coded and others less recognisable. That system, with its inherent contradictions based on competing sources and interpretations, will furthermore differ from one Muslim-majority state legal system to another. Nevertheless, exploring the utopian notion of (discrete) Islamic law based on Qur'anic principles is helpful to ascertain the compatibility of relocating international transitional justice to Muslim-majority legal settings.

Hadith

After the holy book, the second most important source in Islamic law are the *hadith* (Sunna), which carry the normative effect of 'the Prophet's lifetime sayings, deeds and tacit approvals on different issues, both spiritual and temporal'.[46] The *hadith* are considered the complementary revealed source of Islamic law alongside the Qur'an; their applications, however, are inherently contested, as attested by the complex methods to ascertain their accuracy and authenticity.[47] Each *hadith* supposedly reflects a saying or a practice of the prophet which was witnessed directly or indirectly by one of his contemporary followers (male and female) and transmitted to subsequent generations of Muslims until later codification.[48] Consequently, the margin of uncertainty of such normative statements varies according to a variety of factors, first and foremost the perspective and intention of each commentator. As such, legal certainty deriving from the *hadith* is inherently deficient, at least from the perspective of the secular function of Islamic law.

For these reasons, *hadith*-based norms of Islamic law accepted in the positive legal framework of a given society reflect the force of legal formants (as described in chapter 4) even when they are not counted among formal sources of a system. Moreover, the belief in the validity of certain *hadith* will influence the interpretations and applications of positive law in Muslim-majority settings: for instance, a secular positive law, not based on an Islamic principle, may be understood in light of a given *hadith* commonly accepted by the majority of stakeholders of that legal setting. In that regard, Sacco's statement 'whatever affects the

---

[44] Ibid

[45] Ibid, 50

[46] Baderin, *International Human Rights and Islamic Law*, 35

[47] For a comprehensive introduction to the hadith see M.H. Kamali, *A Textbook of Hadith Studies* (The Islamic Foundation 2005). See also Jonathan AC Brown, *Hadith: Muhammad's legacy in the medieval and modern world* (One World Publications 2009)

[48] The most authoritative collection of hadith was compiled by al-Bukhari, about three-hundred years after the time of Mohammed. Another renowned collection is that of Muslim, a follower of Bukhari. See Kamali, *A Textbook of Hadith Studies*, 31 et seq

convictions of the interpreter [and interpretation] is thus a source of law'[49] gives us a sense of how the *hadith* may affect applications of formal law – including PIL provisions underpinning the international frame of TJ. Even processes of 'sacralisation'[50] of secular law through references to *hadith* and to the practices of the early Muslim leaders may also contribute to the consolidation of secular norms in Islamic societies.

Additional sources

Additional sources complement Islamic law beyond the divine revelations; these are man-made rules based on applications through *ijtihad* of normative principles based on the Qur'an and *hadith* in a given spacial and temporal context.[51] The exact number of these additional sources varies between scholars; for example, Cherif Bassiouni, lists twelve supplemental sources of Islamic law:

1. Ijma, consensus of opinion of learned scholars and judges
2. Qiyas, analogy
3. 'Urf, custom and usage
4. Istislah or Maslahah, consideration of the public good
5. Istihsan, reasoning based on the best outcome, or equity
6. The practices of the four first "wise Khulafa", a form of authoritative precedent
7. The decisions of learned judges
8. Treaties and pacts
9. Contracts
10. The edicts of the Khulafa and local rulers which are in conformity with the Shari'ah
11. Fatawa (plural of fatwa) of the most learned scholars
12. Ijtihad.[52]

On the basis of this list, many of the concerns expressed earlier about the status of the *hadith* in light of inherent legal uncertainties are repeated. Some of the sources listed may contradict each other: for instance, the practice of a medieval *khalifa* may be incompatible with present-day human rights treaties in force in Muslim-majority states;[53] or the decision of a (wealthy male) judge from an Ottoman court on commercial transactions may contradict a business contract stipulated in the current socio-economic environment.[54]

---

[49] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)' (1991) 39(2) *American Journal of Comparative Law* 343, 345

[50] Ibid. An example of 'sacralisation' can be found in the proposal to enumerate the UDHR of 1948 as a source of Islamic law, inasmuch as is does not contradict the objectives of *shari'ah* (discussed below) and was not proposed by states hostile to Muslim societies. More on this in M. Fadl, 'International Law, Regional Developments: Islam' in *Max Planck Encyclopaedia of Public International Law* (Max Planck Institute of Public International Law 2010)

[51] On this see inter alia Kamali, *Shari'ah Law: An Introduction*, 19 et seq

[52] M. Cherif Bassiouni, *The Shari'ah, Islamic Law and Post-Conflict Justice* (distributed at the 11th Specialization Course in International Criminal Law, International Institute of Higher Studies in Criminal Sciences (ISISC) Siracusa, 2011) 26

[53] See inter alia Abdullahi Ahmed An-Na'im, *Toward an Islamic reformation: civil liberties, human rights, and international law* (Syracuse University Press 1996)

[54] Background reading: Fatima Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles' (2001) 13 *Pace Intl'l L. Rev.* 1

The fact that these sources are not divine revelations allows for a radical critique of their present uses. We are then free to ask: does the imposition of the death penalty guarantee the best outcome (*istihsan*)?[55] Does gender inequality in court achieve public good (*maslahah*)?[56] Additionally, a previously accepted fatwa of a learned scholar may lose its value today and thus be discarded; likewise, primitive customs not mandated in the Qur'an or *hadith*, such as FGM or child marriage, can be repealed through new laws expressed through *ijma*' – which could be the outcome of a democratic legislative (Parliamentary) process.

The degree of arbitrariness encoded into the supplementary sources of Islamic law is a double-edged sword: on the one hand it may be used to oppress minorities or impose old-fashioned rules of early Muslim leaders, but on the other it enables a range of progressive possibilities to further social justice and human rights. As such, the additional sources may provide means to transpose international transitional justice into Muslim-majority legal settings – as long as they do not contradict the objectives of *shari'ah*.

2.2 Objectives of Islamic Law (*Maqasid as-Shari'ah*)

The objectives of *shari'ah* – *maqasid as-shari'ah* – provide an illustration of the core principles of Islamic law while at the same time illustrating the deeper meaning of the *shari'ah* beyond literal aspects, the 'higher intents of Islamic law'.[57] Kamali considers how Islamic scholars place justice and the concept (and sources) of *maslahah* (described as public interest or benefit or common good) at the heart of Islam and Islamic law, supported by the duty to elucidate and promote these objectives.[58] According to Kamali, *maslahah* is 'the summa' of the objectives of Islamic law, and justice and education are corollaries of it. Thus, he argues 'the Qur'an is expressive (…) of the rationale, purpose and benefit of its laws so much so that its text becomes characteristically goal-oriented'.[59] This flexibility and purposiveness are significant features of Islamic law and inform how it relates to TJ, as discussed in the final chapter.

There are five essential aims of *shari'ah*: faith, life, lineage, intellect and property, as described by the medieval jurist Abu Hamid al-Ghazali.[60] These also reflect the 'criminology' of the Qur'an.[61] A sixth aim was introduced by another jurist (from the Maliki tradition), Shihab al-Din al-Qarafi: the protection of honour (linked to 'lineage').[62] Complementary (secondary) aims may achieve the status of a primary one if the public at large is concerned, and thus *maslahah* can be invoked. Likewise, if two competing aims of different ranks come into conflict, the lesser-order one yields to the higher-order one. An example of this type of aim is the suspension of a criminal punishment in cases of doubt and evidentiary uncertainty.[63] The third category of aims expresses the desirable conduct to facilitate the attainment of essential objectives;

---

[55] For instance William A Schabas, 'Islam and the death penalty' (2000) 9 *Wm and Mary Bill Rts* J 223; Baderin, *International Human Rights and Islamic Law*, 66 et seq

[56] See for instance Mohammad Fadel, 'Two women, one man: knowledge, power, and gender in medieval Sunni legal thought' (1997) 29(2) *International Journal of Middle East Studies* 185

[57] M Bohlander, 'Sisters in Law—Using Maqāṣid al-Shariʿah to Advance the Conversation between Islamic and Secular Legal Thinking' (2014) 28(3) *Arab Law Quarterly* 257, 259

[58] MH Kamali, '*Maqasid al-Shari'ah*: the Objectives of Islamic Law' (1999) 38(2) *Islamic Studies* 193

[59] Ibid, 194

[60] Ibid, 199, citing Abu Hamid al-Ghazali, *Al Mustasfa min Ilm al-Usul* (Cairo: al-Maktabah al-Tijariyyah, 1356/1937).

[61] Ibid, 200. The reference to criminology is useful in relation to the discussion in the final chapter of this thesis.

[62] Ibid

[63] Ibid, 196

these provisions include the principle of fairness in all human interaction, gentleness and pleasant speech.[64] An example reported by Kamali is the recommendation of leniency in imposing penalties for judges and heads of state. He also stresses how, far from being restricted to religious affairs, *maslahah* informs all aspects of human interaction.[65] This makes Islamic law inherently dynamic in society.

The centrality of promoting common benefits for society is also found in the opinions of classical Islamic scholars. Abd al-Salam al-Sulami, for instance, analysed the relationship between the public interest (*maslahah*) and the effective cause (‘*illah*) of an Islamic proposition; Kamali reports his argument:

> The greatest of all the objectives of the Qur’an is to facilitate benefits (masalih) [*plural of maslaha*] and the means that secure them and that the realisation of benefit also included the prevention of evil.[66]

If the objectives of Islamic law are not sufficient for effectively regulating society, additional normative principles can also be found in Islamic values. This step was taken by the classical jurist ibn Taymiyyah, who departed from the notion of a finite number of *maqasid*, expanding to ‘an open-ended list of values’; his contemporaries, remarks Kamali, seem to have generally accepted this novel approach.[67] Among those, Yusuf al-Qaradawi expanded the list to include social welfare, freedom, human dignity and fraternity.[68] Kamali himself adds economic development and research in technology and science to enrich this list.[69] This open-ended list of values is remarkably reminiscent of the debate in human rights law to expand the list of rights worthy of protection.

Kamali draws from the work of Shatibi to discuss the identification of *maqasid*, who notably extends *maslahah* to encompass all benefits ‘of this world and the hereafter, those of the individual and the community, material, moral and spiritual, and those that pertain to the present as well as the interests of the future generations’, including the prevention and elimination of harm.[70] Kamali stresses a novel aspect introduced by Shatibi: ‘inductive conclusions and positions that are so established are the general premises and overriding objectives of the Shari’ah and thus have a higher order of importance than specific rules’.[71] This proposition further problematizes the relationship between *lex specialis* and *lex generalis* as contained in Qur’anic provisions, and may help develop TJ processes in Muslim contexts on the basis of the higher order interests of the social benefits of justice and human rights after a period of violence or authoritarianism.

---

[64] Ibid, 197

[65] Ibid

[66] Izz al-Din Abd al-Salam al-Sulami, *Qawa’id al-Ahkam fi Masalih al-Anam*, ed., Taha Abd al-Ra’uf Sa’d (Cairo: al-Matba’ah al-Husayniyyah, 1351), quoted in Kamali, ‘*Maqasid al-Shari’ah*, 200

[67] Ibid, citing Taqi al-Din ibn Taymiyyah, *Majmu’ Fatawa Shaykh al-Islam Ibn Taymiyyah*, comp., Abd al-Rahman ibn Qasim (Beirut: Muassasat al-Risalah, 1398)

[68] Ibid. citing Yusuf al-Qaradawi, al-Madkhal li Dirasat al-Shari’ah al-Islamiyyah (Cairo: Maktabah Wahnah, 1411/1990)

[69] Ibid, 201

[70] Ibid. at 201 et seq, citing Abu Ishaq Ibrahim al-Shatibi, a-Muwafaqat fi Usul al-Shari’ah, ed., Shaykh ‘Abd Allah Diraz (Cairo: al-Maktabah al-Tijariyyah al-Kubra, n.d.)

[71] Ibid, 293

Finally, Kamali explores the relationship between *maqasid* and *ijtihad*, stating that the former is essential to the latter.[72] In his analysis and selection of authorities, he makes one point clear: literal textual examinations are insufficient without a broader understanding of the general aims of Islamic law. Moreover, he stresses that the aims of *ijtihad* through *maqasid* must also take into account the consequences of interpretative efforts.[73] Thus, the possibility to conduct purposeful readings of sources is encouraged.

The analysis set out so far suggests that Islamic law is to be understood as a key formant of Muslim-majority legal settings, in which the religious and secular purpose of Islamic principles are inextricably intertwined. Nevertheless, the divine character of Islamic law can be qualified on the basis of two main reasons: firstly, a sizeable chunk of *shari'ah* addresses the regulation of human relations and not specific religious principles; secondly, Islamic law owes much of its development to human endeavours which have provided an earthly gloss to the ethics contained in the revealed sources. Against this backdrop, the Qur'an and the *hadith* are complemented by additional sources of Islamic law derived through masterful employment of legal methods to answer normative gaps. Moreover, the objectives of Islamic law provide further orientation of legal interpretations and developments: a dynamic list of Islamic values – and above all the guiding light of common good/public interest (*maslahah*) of a community – are better suited to directing positive law in Muslim-majority legal settings than static religious dogma (even in formally secular systems). The question to consider is how TJ aims and its international paradigm fit with Islamic law and whether this is desirable for either.

[72] Ibid, 204 et seq referencing Muhammad Tahir ibn 'Ashur, *Maqasid al-Shari'ah al'Islamiyyah* (Tunis: Matba'at al-Istiqamah, 1996)

[73] Ibid, 205 et seq

3. The Evolution and Contemporary Practice of Islamic Law

Applications and practice of Islamic law face an unresolved challenge: how can the certainty of divine revelation (for Muslims) of the Qur'an and *hadith* coexist with uncertainty and multiplicity of applications in concrete settings today? As previously noted, classical scholars have navigated this quandary successfully through normative developments that fill gaps left by the main sources of Islamic law, responding to societal needs guided by the *maqasid as-shari'ah*. This section will discuss the flexibility inherent to Islamic law by reviewing the potential of Islamic legal modernist approaches, the centrality of jurists in developing the discipline to suit the needs of society and providing an example of how a millennial religious institution has responded, in that vein, to the Arab uprisings.

The adaptability of Islamic law throughout history and its ability to provide religious rules to suit given contexts from its earliest days has guided an important strand of critical scholarship from Schacht onwards.[74] But other western scholars of Islamic law, such as Weiss, have highlighted some of the limitations imposed by 'Muslim juristic thought' that might hinder its elasticity:

> Espousal of divine sovereignty (the basis of everything else); a fixation upon sacred texts that are the repositories of divine revelation; an uncompromisingly intentionalist approach to interpretation of these texts; a frank acknowledgement of the uncertainty and fallibility of all individual human endeavour to capture the divine intent and a consequent acceptance of probabilism as the foundation of valid interpretation; a tolerance of legal diversity and a willingness to disseminate juristic authority among multiple schools; a moralistic bent grounded in a particular social vision; and, last, a preoccupation with the affairs of private individuals, and especially with family relations and contracts, coupled with a concern to define the limits of the power of government.[75]

Earlier orientalists had already established, unjustly, the immovability of Islamic law in Muslim-majority legal settings; for example, Coulson remarks that:

> Law, in classical Islamic theory, is the revealed will of God, a divinely ordained system preceding and not preceded by the Muslim state, controlling and not controlled by Muslim society. There can thus be no notion of the law itself evolving as an historical phenomenon closely tied with the progress of society.[76]

According to Coulson, the Islamic law doctrine (understood as dogma) possesses two distinctive traits:

> Firstly, it is a rigid and immutable system, embodying norms of an absolute and eternal validity, which are not susceptible to modification by any legislative authority. Secondly, (…) the divinely ordained Shari'a represents the standard of uniformity as against the variety of legal systems which would be the inevitable result if law were the product of human reason based upon the local circumstances and the particular needs of a given community.[77]

---

[74] Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Clarendon Press 1967) building on the previous work of Ignác Goldziher, *Muslim Studies* (Transaction Publishers 2005) (first published in German in 1889-1890)

[75] Weiss, *The Spirit of Islamic Law*, xii et seq

[76] Noel J Coulson, *A History of Islamic Law* (Edinburgh University Press 1964), 1 et seq

[77] Ibid, 4 et seq

But as discussed in the previous section, Islamic law and jurisprudence have been addressed throughout history at policy-level in many Muslim-majority countries and contexts; likewise, its principles have been transformed into positive laws and administered by courts that are unquestionably embedded in a given time and place. Therefore, Islamic law as understood today can express either an ideal type of classical Muslim jurisprudence which is non-existent in reality, or a more nuanced understanding of those principles as employed in context by jurists throughout history and today. Coulson stresses the inherent distinction between 'ideal doctrine and actual practice', and laments the 'grave lacuna in our knowledge of Islamic legal history' to the 'extent to which the ideal law has been translated into actuality in a given area at a given period'.[78] This lacuna has been amply filled since 1964, at the time when Coulson made these observations.[79] An example of the renewed attention afforded to Islamic law and traditions in relation to contemporary contexts is the quest for a shared universal basis of international law principles, with a particular emphasis on human rights.[80] Contemporary work on the translation of Islamic legal principles into practice to ascertain, for instance, the extent to which divine precepts match international human rights law standards and requirements, has shed light on Islamic jurisprudence in its totality: jurisprudence *qua* abstract legal theory, and jurisprudence *qua* case law and other practical developments of the law as influenced by adjudicatory processes in actual dispute-settlement.[81]

Today, a belief of rigidity of Islamic law can be convincingly rebutted. Already in Coulson's work there is evidence of a significant variety in the opinions of legal scholars; moreover, the existence of local customary laws alongside *shari'ah* courts throughout time and space exemplifies how Islamic law has demonstrated the ability to dialogue with its surroundings.[82] In addition to this, the rise of (Islamic) legal modernism has inspired debates as to how 'the Shari'a can be adapted to support the social upheavals and progress of modern times', acknowledging that the law is shaped by societies seeking to answer social problems.[83] Even Kamali acknowledges 'a measure of flexibility in *usul al-fiqh* [*the methodology of law*] which allows for necessary adjustments in the law to accommodate social change' alongside the permanent sources of *shari'ah* which 'may not be overruled on grounds of either rationality or the requirements of social conditions'.[84] All of this points to the flexibility that characterises Islamic law both in its development and in its current applications.

---

[78] Ibid, 3

[79] See inter alia Knut S Vikør, *Between God and the Sultan: a history of Islamic law* (OUP 2005)

[80] The list of titles developing the study of Islamic law and international human rights law is lengthy: by way of example, the exceptional work of An-Na'im is considered by many as the contemporary starting point of this discipline, which has added equal value to the study of Islamic law and the development of international human rights law and standards of universal appeal. See inter alia: An-Na'im, *Towards an Islamic reformation*; Abdullahi Ahmed An-Na'im, 'Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives - A Preliminary Inquiry' (1990) 3 *Harv Hum Rts* J 13

[81] For example, the growing field of Islamic finance and banking law demonstrates the translation of *shari'ah* principles in contemporary realities. Inter alia, Zubair Iqbal and Abbas Mirakhor, *Islamic banking* (International monetary fund (IMF) 1987); Mervyn Lewis and Latifa M Algaoud, *Islamic banking* (Edward Elgar, 2001); Fuad Al-Omar, et al, *Islamic banking: Theory, practice and challenges*, (Zed Books, 1996); Mahmoud A. El-Gamal, *Islamic Finance: Law, Economics, and Practice* (CUP 2006)

[82] Coulson, *A History of Islamic Law*, 5

[83] Ibid. at 6, citing Roscoe Pound, the founder of American functional jurisprudence and the notion of social engineering (see Roscoe Pound, *Social control through law* (Transaction Publishers 1942) as background reading)

[84] Kamali, *Principles of Islamic Jurisprudence*, 7 et seq

Recent examples of the social-functionalist potential of Islamic law are found in the statements issued by Al-Azhar in relation to the Egyptian uprising in 2011, in which the most authoritative centre for Islamic (sunni) studies provides detailed legal reasoning in support for the removal of despotic leaders.[85] However, modern and contemporary legal philosophers do not completely step away from notions of natural law.[86] Likewise, there seems to be only a margin of appreciation inside permissible boundaries within which Islamic lawyers may respond to societal needs creatively whilst upholding the mandated principles and spirit of Islamic law.[87] In that sense, Coulson makes a strong case in support of the renewal of Islamic jurisprudence in light of contemporary needs, which seems to have materialised given the proliferation of studies by Islamic legal modernists[88] in the decades that followed his 1964 work.

The direction taken by Islamic legal modernism – better described as contemporary exegesis of Islamic law in light of a given social context – might enable Muslim-majority legal systems to adapt to current realities while retaining an Islamic character. In the context of contemporary modernism, as noted by Suha Taji-Farouki, 'tradition is recruited either to legitimise change, or to defend against perceived innovation and to preserve threatened values'.[89] Modernist approaches, however, are not an entirely new phenomenon.

3.1 The Potential of Islamic Legal Modernism

The basic claims of Islamic legal modernism can be traced back to earlier debates in Islamic jurisprudence between traditionalists (*ahl al-hadith*) v rationalists (*ahl al-ra'y*).[90] Hallaq describes rationalism as 'a perception of an attitude toward legal issues that is dictated by rational, pragmatic and practical considerations'.[91] Through time, rationalist reasoning (*ra'y*) was considered in opposition to (desirable) strict textualism: therefore, with the increase in the spread of *hadith*, *ra'y* lost its neutral connotation of 'discretionary reasoning' and acquired the negative connotation of arbitrariness and fallibility of human thought.[92] In addition to the conceptual tensions between favouring the development and interpretation of Islamic law as based on either the reported traditions of the prophet or the independent reasoning of jurists, an additional factor to take into account in the formation of Islamic jurisprudence is the standing afforded to the good examples of predecessors (*sunan*).

---

[85] The al-Azhar Declaration in Support for the Arab Revolutions, 31 October 2011, Adel Maged and Alice Panepinto trs, available at www.dur.ac.uk/ilm [accessed 30 June 2013]

[86] For example in an Islamic context see Mohammad Abed al-Jabri, *Democracy, Human Rights and Law in Islamic Thought* (IB Tauris 2008), 180 et seq. On the use of natural law in international law see inter alia: Josef L Kunz, 'Natural-law thinking in the modern science of international law' (1961) *AJIL* 951; Stephen Hall, 'The persistent spectre: natural law, international order and the limits of legal positivism' (2001) 12(2) *EJIL* 269. Distortions of the use of natural law in international law are presented in William C Bradford, 'The Duty to Defend Them: A Natural Law Justification for the Bush Doctrine of Preventive War' (2003) 79 *Notre Dame L Rev* 1365. Further perspectives on the interesting relationship between international law and natural law have been proposed by Martti Koskenniemi in (*inter alia*) 'Miserable comforters: International relations as new natural law' (2009) 15(3) *European Journal of International Relations* 395

[87] Coulson, *A History of Islamic Law*, 6. The phrase 'spirit of Islamic law' is from Weiss, *The Spirit of Islamic Law*

[88] For instance, Fazlur Rahman, 'Islamic modernism: Its scope, method and alternatives' (1970) 1(4) *International Journal of Middle East Studies* 317. For a broader discussion on Islamic legal modernism, see Suha Taji-Farouki (ed) *Modern Muslim intellectuals and the Qur'an* (OUP 2004)

[89] Taji-Farouki, *Modern Muslim intellectuals and the Qur'an,* 1

[90] Hallaq, *The Origins and Evolution of Islamic Law*, 74 et seq

[91] Ibid

[92] Ibid, 76

Hallaq discusses the *sunan* at length, suggesting how earlier judges based their decisions on their *ra'y*, having given due consideration to the *sunan* of the forbearers, resulting in the *ra'y* being 'an extension of, and based upon' '*ilm* (knowledge of precedent).[93] Contextually, Hallaq notes a crucial element of Islamic jurisprudence: by incorporating the authority of the *sunan* – which takes into account both the prophetic traditions (*hadith*), the traditions of his companions and potentially any pre-Islamic tradition not repealed by the prophet – Islamic jurisprudence departs from the centrality of Muhammad's message (be it the revelation of the Qur'an or his own traditions).[94] In light of this analysis, the sources of Islamic law discussed previously seem to be merely an 'established, continuous practice' that became 'a model to follow'[95] – quite distinct from divinely-ordained principles.

In a contemporary expression of Islamic legal modernism, An-Na'im makes a case for studying Islamic legal theory in relation to the needs of contemporary societies.[96] An-Na'im argues that *shari'ah* as is it known today 'was in fact *constructed* by Muslim jurists over the first three centuries of Islam' through human interpretation.[97] Thus Islamic legal modernism is 'modern' inasmuch as it is a contemporary discipline with an eye to contemporary social needs; but its purported sources still are the Qur'an and the *hadith*. These sources, however, may be accessed and interpreted directly, without necessarily having to conform to the earlier scholarly writings of the classical Islamic jurists serving societies different from those today.

The reform methodology proposed by An-Na'im was first developed by Mahmud Mohamed Taha in *The Second Message of Islam*.[98] It involves 'establishing a new principle of interpretation that would permit applying some verses of Qur'an and accompanying Sunna instead of others, (…) breaking the deadlock between the objectives of reform and the conception and techniques of historical Shari'a'.[99] This is possible because there are 'two levels or stages of the message of Islam, one of the earlier Mecca period and the other of the subsequent Medina stage'; the 'earlier message of Mecca is in fact the eternal and fundamental message of Islam, emphasizing the inherent dignity of all human beings, regardless of gender, religious belief, race, and so forth'.[100] This was a time of peace, as opposed to the subsequent Medina period, characterised by conflict. An-Na'im draws extensively on Taha's detailed textual analysis to illustrate and explain the shift in normative principles between the Mecca and Medina periods; he calls for the return to the Meccan verses, more in line with the principles of human rights as espoused by the international community today, to unlock much-needed reform potential.[101] He also calls for the consideration of *naskh* – the Islamic technique of abrogation of the ruling and wording of certain contradictory Qur'anic verses in order to 'suspend the application of a clear and definite verse of the Qur'an under appropriate circumstances'.[102] Though these arguments are convincing and have contributed greatly to the constructive debate about Islamic

---

[93] Ibid, 199 et seq
[94] Ibid
[95] These expressions are taken from the glossary in Hallaq, *The Origins and Evolution of Islamic Law*
[96] An-Na'im, *Toward and Islamic Reformation*
[97] Ibid, 185 et seq
[98] Taha, *The Second Message of Islam*
[99] An-Na'im, *Toward and Islamic Reformation*, 34 *et seq*
[100] Ibid, 52, quoting Taha
[101] This is explained in great detail in An-Na'im, *Toward and Islamic Reformation*, 52-68, and in Taha
[102] Ibid, 60

law and human rights, the interpretative propositions put forward by An-Na'im and Taha have unfortunately not been received with universal enthusiasm by commentators. For example, Kamali, a 'centrist' on the scale of conservativism, rejects the possibility of critical textual analysis:

> The Qur'an is an indivisible whole, and a guide for belief and action that must be accepted and followed in its entirety. Hence, any attempt to follow some parts of the Qur'an and abandon others will be totally invalid.[103]

For the purposes of this thesis however, the approach proposed by An-Na'im seems to be the most constructive and convincing in light of the renewal of Islamic law and its survival as a constructive normative force today. As such, this potential for flexibility – in the name of *maslahah* of contemporary societies – presents Islamic law as a potentially constructive force for developing transitional justice in Muslim-majority legal settings today.

But what about the contribution of non-Muslim scholars to this debate? Coulson, as a western orientalist scholar of Islamic law at the service of Muslim modernist legal activities, answers affirmatively:

> Western scholarship has demonstrated that Shari'a law originated as the implementation of the precepts of divine revelation within the framework of current social conditions, and thus provides the basis of historical fact to support the ideology underlying legal modernism.[104]

In light of this assertion, though open to accusations of orientalism,[105] it could be suggested that contact between Muslim and non-Muslim scholars of Islamic law has been fruitful in the past in developing contemporary Islamic legal theory which introduces contemporary social needs alongside the precepts of divine revelation. Leaving divinity to one side would enable scholars to engage more openly with the social function of Islamic law – which could also include the facilitation of a transitional justice process. Fostering actual dialogue and debate between Muslim and secular scholars, in that regard, is much needed.[106]

On the other hand, it is essential to recall that contributions by non-Muslim scholars to the study of Islamic law have not always been well-received. For example, Joseph Schacht's famous separation between law and religion in the Islamic tradition[107] has been strongly criticised by some Muslim scholars of Islamic law.[108] However, Muslim scholars of Islamic law as well as non-Muslim scholars have successfully developed novel approaches to the discipline that cross-reference each other and enrich the conversation. As always, the optimal solution is to allow everyone to have their say – academic spirit and human reason (whether or not guided by divine providence) will determine the debate.

---

[103] Kamali, *Principles of Islamic Jurisprudence,* 18

[104] Coulson *A History of Islamic Law*, 7

[105] See, in general, Edward Said, *Orientalism* (Vintage Books 1978)

[106] On the challenges of fruitful debate between Islamic and secular jurists, see *inter alia* Bohlander, 'Sisters in Law'

[107] Schacht, *The origins of Muhammadan Jurisprudence*

[108] E.g. M Mustafa Al-Azami, *On Schacht's Origins of Muhammadan Jurisprudence* (Oxford Centre for Islamic Studies/Islamic Texts Society 1985) 5 et seq

3.2 The Role of Jurists in the Formation of Islamic Law

In their attempt to understand Islamic law, western scholars have identified the centrality of lawyers as a key feature of this system. Schacht has famously referred to Islamic law as an 'extreme case of a jurist's law'.[109] Likewise, Sacco posits that 'the revealed texts are only the historical starting point of the *shari'a* which is a scholarly creation', strengthened by the lack of a central authority mandated with the task of defining an official theology that forms the basis of Islamic law and the absence of 'a cult of judicial precedent'.[110] Although the two justifications proposed by Sacco can be questioned as the following section of this chapter suggests, the role of jurists in advancing and dispensing Islamic law is worth exploring further. Muslim scholars have also described Islamic law as 'lawyer's law', whose provisions 'are to be sought first and foremost in the teachings of the authoritative jurists'.[111] Discussing the power of legal authority, Hallaq explains the primacy of lawyers in Islamic law 'because the jurists are the carriers of the authority that sustained it for over a millennium'.[112]

Following on from the earlier discussion, this suggests that Islamic law is based more on human reasoning than divine injunctions. The paragraphs that follow explore the three main groups of jurists that have contributed to the formation of Islamic law, namely the judiciary, the juristic schools and the jurisprudents whose independent legal reasoning has traditionally filled normative gaps. Just as their classical predecessors, jurists of different kinds can, today, advance Islamic law for the real needs of Muslim-majority legal settings, including those facing transitional justice.

Judiciary

Still today, alongside the secular court system of Muslim-majority societies, the notion of the 'Islamic judge' remains important to characterise the way judges see their own profession in relation to (and constitutive of) the legal system.[113] Historically, the professionalisation of the judiciary and the establishment of courts constitutes a turning point across legal systems.[114] In Islamic legal theory, 'the judge represents the authority of the Imam (head of the state) and exercises power in the capacity of his *wakil* (representative)'.[115] By the middle of the eighth century, the judiciary had become professionalised and separate from administrative, policing and fiscal bodies.[116] Hallaq identifies the consolidation of judicial independence from the appointing agency at around the same time as a turning point for the Islamic legal tradition.[117]

---

[109] Joseph Schacht, *Introduction to Islamic Law* (Clarendon Press 1966), cited in Weiss, *The Spirit of Islamic Law*, 113

[110] Rodolfo Sacco, 'Legal formants: a dynamic approach to comparative law (Installment II of II)' (1991) *American Journal of Comparative Law* 343, 348

[111] Inter alia, Badr, 'Islamic Law: Its relation to other legal systems', 189

[112] Wael B Hallaq, 'Juristic authority vs. state power: the legal crises of modern Islam' (2003) *The Journal of Law and Religion* 243, 245. For a complementary analysis of the judiciary in relation to MENA legal systems, see Chibli Mallat, 'From Islamic to Middle Eastern Law: A Restatement of the Field (Part II)' (2004) *American Journal of Comparative Law* 209

[113] Muhammad Khalid Masud, Rudolph Peters and David Stephan Powers (eds), *Dispensing Justice in Islam: Qadis And Their Judgements* (Brill 2006)

[114] For an interesting reading on similar themes in Europe, see Richard H. Helmholz, 'The Early History of the Grand Jury and the Canon Law' (1983) 50 *University of Chicago Law Review* 613

[115] M.H. Kamali, 'Appellate Review and Judicial Independence in Islamic Law' (1990) 29(3) *Islamic Studies* 215, 225

[116] Hallaq, *The Origins and Evolution of Islamic Law*, 97 et seq

[117] Ibid, 83 et seq

The composition of the *qadi*'s (judge's) court is also illustrative of the role of the judiciary in early Islam, and the extent to which that has contributed to the development and consolidation of Islamic law. Hallaq provides a comprehensive list of court staff which reflected the needs and function of the bench, including scribes, assistants such as the court chamberlain to ensure order and supervise litigants, court interpreters and witness examiners (*ashab al-masa'il*), whose job it was to:

> Enquire about the integrity of character witnesses whose function it was in turn to attest to legal records, contracts and all sorts of transactions passing through the court.[118]

The (relative) binding force of a judgment[119] and the possibility to appeal or reverse a decision exemplifies the possibility of error even by the prophet Muhammad.[120] Thus, if a judge has exerted sound legal reasoning in good faith, that decision is enforceable and cannot be reviewed by another judge, only by the original one.[121] However, if the error amounts to a 'gross error of judgment' 'that could not be the result of sound *ijtihad* and leads to a manifest miscarriage of justice', then the decision is reviewable.[122] This suggests that the judiciary was tasked with two important responsibilities, in addition to adjudication: firstly, the exercise of sound legal reasoning, and secondly, subsequent reflection – and one presumes dialogue – as to the shortcomings of one's own or someone else's conclusions. In that regard, judges could also rely on the analysis provided by scholars and jurisconsults,[123] as discussed in the paragraphs that follow.

Juristic Schools

Scholarly writings are given prominence in Islamic law.[124] Around the eleventh century, four schools of Islamic law were 'recognized as orthodox': the Hanafi, Maliki, Shafi'i and Hanbali schools.[125] This was contemporary to the limitation of independent legal reasoning (*ijtihad*), described as 'the maximum effort expended by the jurist to master and apply the principles and rules of *usul al-fiqh* (legal theory) for the purposes of discovering God's law'.[126]

> The door of *ijtihad* was closed and the efforts of the jurists were reduced to *taqlid* (literally, "imitation") or submission to the canons of the four schools. The writings of the founders of these schools (or their disciples) became the standard textbooks for all students of law and any effort to depart from them was denounced as *bid'a* (innovation)".[127]

---

[118] Ibid, 85 et seq

[119] On Islamic case law see inter alia Lawrence Rosen, 'Islamic 'case law' and the logic of consequence' in June Starr, Jane Fishburne Collier (eds), *History and power in the study of law: new directions in legal anthropology* (Cornell University Press 1989), 302; and also John Makdisi, 'Legal logic and equity in Islamic law' (1985) 33(1) *American Journal of Comparative Law* 63

[120] Described in Kamali, 'Appellate Review and Judicial Independence in Islamic Law', 228

[121] Ibid, 229

[122] Ibid

[123] Hallaq, 'Juristic authority vs. state power', 248

[124] As discussed in the previous chapter and in Sacco, 'Legal Formants (Instalment II of II)', 347 et seq

[125] Khadduri, 'Nature and Sources of Islamic Law', 19

[126] On this controversial issue see inter alia Hallaq, 'Was the gate of ijtihad closed?', 3

[127] Khadduri, 'Nature and Sources of Islamic Law'

The four schools, however, 'were not formal educational institutions or officially-sanctioned law-making bodies'; instead, 'they were rather groups of jurists each following a certain doctrine that can be traced back to a prominent pioneer of the second century of the Muslim era whose name the school carries'.[128] The eventual formalisation of legal schools marks 'one of the most defining characteristics of Islamic law'.[129] Their doctrinal influence emerged alongside their institutional capacity.[130]

Jurists possess what Weiss calls 'interpretative or declaratory authority', which has the actual force of influencing positive law as opposed to legislative authority, which instead belongs to god.[131] The *mujtahids* (performers of *ijtihad*) derived law from the sacred texts, whereas non-*mujtahids* interpreted secondary sources.[132] These jurists employed all the techniques of legal reasoning, the principles of text criticism and intentionalist hermeneutics.[133] Their knowledge included 'legal theory, Quranic exegesis, *hadith* and its criticism, legal language, the theory of abrogation, substantive law, arithmetic, and the all-important science of juristic disagreement'.[134] Hallaq stresses the 'dynamic and vibrant nature' of *taqlid* (authority) emanating from the doctrinal schools,[135] suggesting that a diverse and active community of legal scholars was traditionally present.

Jurisconsults (Muftis)

As a third category conceptually distinct from both judges and scholars engaged in Islamic law questions, the *mufti* is a 'jurisprudent who issues fatwas', formally non-binding legal opinions, which however may be adhered to by judges.[136] 'The fatwa represented a legal opinion stated in universal terms, reflecting both the most authoritative law in the school as well as legitimised legal practice'.[137]

Messick has situated *muftis* in the 'interpretative interface of theory and practice of Islamic law', filling the 'niche between the jurist as teacher and the jurist as judge'.[138] This describes:

> The tension between the dictates of textual theory and the circumstances of actual cases results, in a fatwa, in a 'reading' of a textual theory, while in a judgment it leads to a 'reading' of a practical fact.[139]

---

[128] Badr, 'Islamic Law: Its relation to other legal systems', 189

[129] Hallaq, *The Origins and Evolution of Islamic Law*, 150 et seq

[130] Bernhard Weiss, 'The Madhhab in Islamic Legal Theory' in PJ Bearman, Rudolph Peters and Frank E Vogel (eds), *The Islamic school of law: evolution, devolution, and progress* (Islamic Legal Studies Program, Harvard Law School Harvard University Press 2005). See also Wael Hallaq, 'Can the Sharia Be Restored?' in Yvonne Yazbeck Haddad and Barbara Freyer Stowasser (eds), *Islamic Law and the Challenges of Modernity* (Altamira Press 2004) for a discussion of the *madhab*

[131] Weiss, *The Spirit of Islamic Law*, 114

[132] Ibid, 115 et seq and 135

[133] Ibid

[134] Hallaq, *The Origins and Evolution of Islamic Law*, 156 et seq

[135] Wael B Hallaq, *Authority, continuity and change in Islamic law* (CUP 2001), 120

[136] These definitions are taken from the glossary in Hallaq, *The Origins and Evolution of Islamic Law*

[137] Hallaq, 'Juristic authority vs. state power', 248

[138] Brinkley Messick, 'The Mufti, the text and the world: legal interpretation in Yemen' (1986) 21(1) *Man* 102, 103 et seq

[139] Ibid

The relationship between theory and practice is important both historically and at present. In a detailed historical examination of the role of fatwas in developing substantive law, Hallaq refutes the claim that 'after the formative period Islamic substantive law became increasingly rigid, eventually losing touch with the political, social, and economic developments',[140] suggested by scholars such as Coulson and Schacht.[141] Instead, he defends the 'important role that the *fatwas* played in the development of legal doctrine as embodied in the *furu'* (substantive law) works', establishing a 'connection between *fatwa* as a legal discourse and *fatwa* as a social instrument'.[142] As such, a functionalist intent can be seen as deeply embedded in a *fatwa*.

To describe how fatwas developed in connection to society, Hallaq suggests they 'were the outcome of a concrete and particular reality that originated outside the jurists' minds', revolving 'around (…) persons in highly particular circumstances'[143] Later Ottoman manuals on *fatwas* were 'highly practical and pragmatic', and a dictum linked to fatwas recites that 'no *fatwa* should be issued with regard to a problem that has not yet occurred in the real world', and as such they 'emanated from a particular social reality involving real people with real problems'.[144] Only the *fatwas* 'that added new material to the current body of legal doctrines' were then incorporated into substantive law.[145]

On the basis of this, Hallaq argues that it was the *mufti*, and not the *qadi*, 'who was responsible for the development of the legal doctrine embodied in the *furu'* works' after the second century of Islam (the eighth century), breaking from the function of the early judges in developing substantive Islamic law.[146] The relationship between the *mufti* (issuing fatwas) and the *qadi* (issuing a judgement in relation to judicial disputes) 'is explained by the fact that the judge depended heavily upon the mufti's opinions' – to the extent to which often muftis were attached to a court and their fatwas became binding.[147] Thus:

> The stipulation that the judge must resort to the *mufti* for legal advice underscores the fact that it is the *mufti*, not the *qadi*, who is the ultimate expert on the law.[148]

Muftis enjoyed numerous advantages over *qadis*: the mufti performed *ijtihad* (independent legal reasoning); he was independent from government authorities and thus was less likely to be involved in political corruption; moreover, a *mufti*'s fatwa could question or reverse a *qadi*'s judgment, on the basis of the fact that the *mufti*'s duty was 'discovering and applying the law'.[149] In relation to the prominent role of *muftis* in

---

[140] Wael B. Hallaq, 'From Fatwas to Furu': Growth and Change in Islamic Substantive Law' (1994) 1 *Islamic Law and Society* 1, 29

[141] Ibid referencing N.J. Coulson, 'The State and the Individual in Islamic Law' (1957) 6 *ICLQ* 57; and Schacht, *The Origins of Muhammadan Jurisprudence*

[142] Ibid, 30 et seq

[143] Ibid, 32 et seq

[144] Ibid, 37 et seq

[145] Ibid, 50

[146] Ibid

[147] Ibid, 56

[148] Ibid

[149] Ibid. Moreover, Hallaq reports how a prophetical saying went: "on the Day of Resurrection the judges will join the Sultans, but the '*ulama'* (=*muftis*) will join the Prophets", stressing the closer proximity of the muftis to the essence of the Islamic principles and law

developing Islamic law through *fatwas*, Hallaq concludes that 'our current perception of Islamic law as a jurists' law [*as argued by Schacht*] must now be further defined as a mufti's law'.[150] Today, this proposition is still valid, though the relationship between *muftis* and authorities has become more politicised, explaining the more recent phenomenon of state muftis.[151] The 'independent' role of muftis seems to be exercised through new media – as attested by the appearance (and success) of internet *fatawa*.

This summary overview of the historic standing of jurists – judges, scholars and *muftis* – in developing Islamic law and, relatedly, Muslim-majority legal systems, supports arguments in favour of their greater involvement even in contemporary settings. Jurists have the potential to influence the law of present-day nations states – regardless of whether or not those states are formally presented as 'Islamic' – to the extent that the balance of powers permits. Without romanticising the potential role of jurists in promoting the Islamic aim of *maslahah* discussed above, intellectual arguments based on Islamic law that counter abusive executives may be one of the few non-violent tools in furthering the objectives of transitional justice. The following paragraphs will discuss the role of Al-Azhar, a leading scholarly collective, in shaping transitional justice in Egypt.

3.3 The Voice of Al-Azhar in Transitional Justice in Muslim-majority settings

Having set out some historical illustrations of the role of jurists as formants of Islamic law, the paragraphs that follow demonstrate how they have an influence today. A striking example drawn from the transitional justice context of the Arab Uprisings beginning in 2011 can be found in the (intellectual) support offered to the revolutionaries by the millennial Islamic institution of Al-Azhar.[152] Founded in the 900s as a centre of Islamic learning, Al-Azhar has been described as a religious institution by Malika Zaghal in these terms:

> "the humanly devised constraints" that shape the interaction between men and God, or to be more precise, a structure of mediation between the divine and the human that offers interpretation of scripture to the faithful, manages religious ritual and transmits religious knowledge.[153]

Throughout history, and more so in the twentieth century, the relationship between Al-Azhar and (Egyptian) politics has been complex, bringing to the fore some of the most sensitive issues linked to the authorities' control of the religious sphere.[154] Notably, the Egyptian authorities in the latter part of the 1900s have championed Al-Azhar as the voice of moderate Islam, approved by the politicians and theologians alike; this has helped distance national Islam from the positions held Muslim Brotherhood and other Islamist groups, as

---

[150] Ibid, 65

[151] Jakob Skovgaard-Petersen, 'A Typology of State Muftis' in Yvonne Yazbeck Haddad and Barbara Freyer Stowasser (eds), *Islamic Law and the Challenges of Modernity* (Altamira Press 2004)

[152] See the al-Azhar Declaration in Support for the Arab Revolutions, 31 October 2011

[153] Malika Zeghal, 'The "Recentering" of Religious Knowledge and Discourse: The Case of al-Azhar in Twentieth Century Egypt', in Robert Heffner and Muhammad Qasim Zaman (eds) *Schooling Islam: The culture and politics of modern Muslim education* (Princeton University Press 2007), 107 et seq citing Douglas North

[154] For a historical analysis see inter alia Daniel Crecelius, 'Al-Azhar in the revolution' (1966) 20(1) *The Middle East Journal* 31; and Malika Zeghal, 'Religion and politics in Egypt: The ulema of al-Azhar, radical Islam, and the state (1952–94)' (1999) 31(3) *International Journal of Middle East Studies* 371

well as secular forces.[155] Its leaders enjoy the prerogative to 'speak for religion in public life' as recognised learned scholars, and are separate from the state-run *dar al-ifta*, the fatwa-issuing body (also) consulted by the institutions.[156]

Breaking loose from its institutional masters, since the fall of Mubarak Al-Azhar seems to have for a moment taken on a different role, using Islamic jurisprudence to shield the revolutionaries from accusations of *baghi* (the Islamic *hudud* crime of rebellion, analysed in the final chapter of this thesis) and in support of a regime change not only in Egypt, but across the MENA region. Al-Azhar's engagement in the Arab uprisings has been described as a 'good example' of its 'latent reform potential (…) for the development of Islamic principles',[157] which may help further transitional justice goals.

The *Al-Azhar declaration on Support of the Arab Revolutions*[158] and the *Al-Azhar Document on the Future of Egypt*[159] provide a fitting example of how an institution of Islamic scholars has actively participated in the TJ process. Egyptian commentators, such as judge Adel Maged have welcomed these developments:

> Both documents should have an influence on the constitutional structure of the emerging Egyptian regime and the legal rules governing the right to protest and revolt against authoritarian regimes throughout the Arab world.[160]

The text of the *Al-Azhar Document on the Future of Egypt* refers to the general principles of *shari'ah*, leaving 'considerable room for a modern interpretation of Islamic concepts and values rather than citing specific provisions in the traditional Islamic rules'.[161] That modern (functionalist?) interpretation would be justified by *maslahah*, with the common benefit to transitional Muslim-majority societies as a goal. Siding with the revolutionaries, the *Document* calls for the establishment of 'a modern and democratic state' supported by 'Islamic precepts' that 'include pluralism, rotation of power, determining specializations, monitoring performance, seeking people's public interests in all legislations and decisions, ruling the state in accordance with its laws, tracking corruptions and ensuring the accountability of all people' (Articles 1 and 2). The institution openly promotes its own important role in 'guiding toward right moderate Islamic thinking' (preamble). Thus, Al-Azhar offered an Islamic-compliant argument to oppose authoritarianism in Egypt and across the region – upholding the values of democracy and faith in the same breath.

The *Al-Azhar Declaration in Support of the Arab Revolutions* has a similar purpose. It broadens Al-Azhar's influence on Arab transitions beyond the Egyptian uprising (Tunisia, Libya, Syria and Yemen are expressly listed) recalling the 'spirit of freedom in Islam and the Islamic rules on the legitimacy of authority and

---

[155] Zeghal, 'The "Recentering" of Religious Knowledge and Discourse', 109. See also Steven Barraclough, 'Al-Azhar: Between the government and the Islamists' (1998) 52 *The Middle East Journal* 236

[156] Nathan J Brown, 'Post-Revolutionary Al-Azhar' (2011) The Carnegie Papers, Middle East, 5 et seq

[157] Michael Bohlander, 'Political Islam and Non-Muslim Religions - A Lesson from Lessing for the Arab Transition', (2014) 25(1) *Islam and Christian-Muslim Relations* 27, 29

[158] The Al-Azhar Declaration in Support for the Arab Revolutions, 31 October 2011

[159] The Al-Azhar Document on the Future of Egypt (Al-Azhar and a group of Egyptian Educated elite), 21 June 2011, available in English at http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?ArtID=56424 [accessed 30 June 2013]

[160] Adel Maged, 'Commentary on the Al-Azhar Declaration in Support of the Arab Revolutions' (2012) 4(3) *Amsterdam Law Forum* 69 et seq

[161] Ibid, 70

reform, and the achievement of the objectives and the supreme interests of the nation' (preamble). This document engages directly and critically with literal Quranic provisions, informing its audience of the correct or spurious interpretations of specific verses on obedience towards rulers (Article 1). The *Declaration* also absolves peaceful demonstrators (termed 'patriotic protesters' in the text) against unjust rulers from the classic Islamic crime of *baghi* (the transgression or rebellion against the legitimate leader through the use of force) (Article 2). The *Declaration* goes a step further, highlighting the positive synergy between Islamic law and international human rights law in guaranteeing freedom of assembly and political protest: 'national peaceful movements constitute the core of human rights in Islam, as confirmed by all international conventions' (Article 2). Article 3 then divests the authorities from power after violently oppressing civilians – and gives a Quran'ic reference to support this proposition.[162]

These documents are truly remarkable in terms of how Islamic principles can be used to further TJ, going as far as accusing dictators of violating the 'spirit of freedom' of Islam, alongside the protection of the 'supreme interests of the nation', which perhaps encompasses *maslahah* understood in a contemporary Muslim-majority legal system. The success of Al-Azhar has been explained as follows:

> Unlike the Islamists, al-Azhar was scholarly and not mired in politics. Unlike the Salafists, its approach to religion could be presented as more consistent with the needs of a twenty-first-century society. And unlike both, Ahmed el-Tayeb [*the Grand Imam of Al-Azhar*] posed as a promoter of consensus, leading national dialogues and issuing widely supported statements and documents to guide the tumultuous political process.[163]

Interestingly, the Grand Imam had also served as Grand Mufti of Egypt – whose chief role was to deliver official *fatwas* requested by the institutions. The factors outlined here may have contributed to Al-Azhar's eagerness to participate in the TJ debate. Moreover, the two documents presented carry a doctrinal (but not legally binding) force relevant to other Muslim-majority contexts facing authoritarian rule. This example may also provide an illustration of Hallaq's argument on the continuity of *ijtihad* throughout Islamic history into the twenty-first century.[164] The reception of this activism, however, should be understood from a political angle, as well as from the perspective of its normative significance, as politics will ultimately decide the strength of Al-Azhar's voice in the TJ debates.

In sum, recent events in the Muslim-majority Arab World and the role played by Islamic institutions such as Al-Azhar provide further proof of creative interpretations of the sources by jurists facing pressing contemporary social requirements – including those of transitional societies. As such, the functionalist impact of scholarly opinions is reaffirmed, demonstrated by the political solidarity expressed by Al-Azhar to the revolutionary cause through a dynamic and purposive reinterpretation of Islamic law. The Islamic blessing of a legitimate, yet fundamentally political position sets the scene for further dynamic and strategic uses of *shari'ah* in connection to TJ.

---

[162] If anyone killed a human being — unless it be [in punishment] for murder or for spreading corruption on earth —, it shall be as though he had killed all humankind; whereas, if anyone saves a life, it shall be as though he had saved the lives of all humankind (Qur'an, Surah Al-Mâ'idah: 5/32)

[163] Ahmed Morsy and Nathan J Brown, 'Egypt's al-Azhar Steps Forward' (2013) Carnegie Endowment for Global Peace, available at http://carnegieendowment.org/2013/11/07/egypt-s-al-azhar-steps-forward# [accessed 8 November 2013]

[164] Hallaq, 'Was the gate of ijtihad closed?', 33 et seq

4. International Law in Muslim-majority Legal Settings

The juxtaposition and interaction between PIL (and specifically for the purposes of this thesis, ICL and IHRL) and the Islamic legal tradition is a reality – explicitly or latently so – of all Muslim-majority countries. Indeed, virtually all contemporary states present a multi-tier legal system that encompasses international obligations, a centralised domestic normative framework, local regulations, religious norms and customary elements. Islamic law and International law (among other law, of course) necessarily coexist as formants of Muslim-majority legal systems.

A recurrent and widespread misconception regarding the relationship between PIL and Islamic law assumes the two legal domains as dichotomous. This attitude seems to reflect that peculiar tendency of some comparative (and non-comparative) legal commentators who set out to highlight differences in order to select a clear prevailing model (generally that of their own tradition), instead of engaging in a more balanced evaluation, which tends to be more conducive to an informed, nuanced and constructive approach to much-needed dialogue.[165] Notably, in the wake of 9/11 there has been a creeping demonisation of Muslims *qua* Muslims in the context of 'western' international law based on their supposed adherence to radically different normative values.[166] Even the ECHR has fallen into the trap of superficial comparativism, suggesting that 'sharia is incompatible with the fundamental principles of democracy' set out in the European Convention.[167] Conservative scholars and politicians in both camps have fallen into the trap of prejudice towards the other.[168] Fortunately, numerous other scholars have argued convincingly that there is not only a significant theoretical overlap between the methods and objectives of international law and *shari'ah* (regardless of the sources – which are clearly of different philosophical inspiration),[169] but also that the two may legitimately draw upon each other both in the interest of justice and to reflect and appreciate the multi-stratified complexity of the globalised legal order.[170]

The convergence between international law and *shari'ah* can be cemented doctrinally through Islamic jurisprudence. The adoption of valid international treaties through the ordinary diplomatic channels provides

---

[165] For an evaluation of the comparative study of International law and Islamic law, see D. Westbrook, 'Islamic International Law and Public International Law: Separate Expressions of World Order' (1992-1993) 33 *Virginia Journal of International Law* 819

[166] On the purposeful exclusion of Muslim from the idea of law and rights in the west, see inter alia Sherene Razack, *Casting out: The eviction of Muslims from western law and politics* (University of Toronto Press, 2008); and Wael B. Hallaq, 'Muslim rage and Islamic law' (2002) 54 *Hastings LJ* 1705. And from a feminist angle Sunaina Maira, '"Good" and "bad" Muslim citizens: feminists, terrorists, and US Orientalisms' (2009) 35(3) *Feminist Studies* 631

[167] *Refah Partisi and others v Turkey* (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98) 13 February 2003, para 123

[168] For a range of examples see inter alia Javaid Rehman, 'Islamophobia after 9/11: International Terrorism, Sharia and Muslim Minorities in Europe—The Case of the United Kingdom' (2003) 3(1) *European Yearbook of Minority Issues Online* 217

[169] For instance, A. Maged, 'Arab and Islamic Shari'a Perspectives on the Current System of International Criminal Justice' (2008) 8(3) *ICLR* 477; M. Bohlander and M.M. Hedayati-Khakhi, 'Criminal Justice under Shari'ah in the 21st Century – An Inter-Cultural View' (2009) 23 *Arab Law Quarterly* 417

[170] For examples of fruitful analyses of both directions of legal borrowing, see M. Fadl, 'International Law, Regional Developments: Islam' on importing the tenets and instruments of PIL inclusive of International Criminal Law (ICL) within the realm of Islamic Law; and M. Elewa Badar, 'Islamic Law (*Shari'a*) and the Jurisdiction of the International Criminal Court' (2011) 24 *Leiden Journal of International Law* 407 on the inclusion of the Islamic legal system among those considered by the international criminal judge

acceptance of general international law through the means of Islamic international law.[171] This is based on a theoretical division in classical Islamic law (9th- 12th century) according to which a community was either under *dar al-islam*, i.e. the territory of Islam, ruled by Muslims under *shari'ah* for the benefit and security of the faithful, or under *dar al-harb*, i.e. the territory of war, where Muslims were under foreign domination or threat, and thus the *shari'ah* could not be guaranteed, or, still, under *dar al-suhl*, a territory which had a pact (of peace) with the Muslims.[172] Under this third category as well as under *dar al-islam*, valid international treaties could form part of the sources of applicable laws to a community.

During the course of his life, prophet Muhammad entered diplomatic agreements with numerous non-Muslim rulers, paving the way for subsequent treaties between Muslims and Christians throughout the Middle Ages and early Modernity.[173] And in the 20th century, 'the active participation of Muslim states in international conferences, in the League of Nations, and the United Nations and its agencies, demonstrated that the *dar al-islam* has at least reconciled itself to a peaceful coexistence with *dar al-harb*'.[174] Shaheen Sardar Ali and Javaid Rehman describe the connection between *dar al-sulh* and international peace and security.[175] Similarly, Mohammad Fadl also explains why in the new world order the category of *dar al-harb* has become obsolete:

> The rise of international law and institutions such as the United Nations (…) radically changed the political environment (…) from one in which war and conquest was the default rule to one in which peace and friendship was the default rule. (…) Islam could fulfil its universal aspirations simply by virtue of international guarantees of religious freedom and the commitment by non-Muslim States to maintain a posture of neutrality with respect to the Islamic religion. (…) Any State that committed itself to providing Muslims freedom of religion and permitted Islam to be taught freely could not be considered part of *dar al-harb*.[176]

As a result of this paradigmatic shift, Fadl suggests that Islamic international law is a 'set of rules that enables the creation of binding international agreements rather than the imposition of a set of mandatory

---

[171] Fadl, 'International Law, Regional Developments: Islam', 5 et seq. For an overview of Islamic international law, see Majid Khadduri, *The Islamic law of nations: Shaybani's Siyar* (Johns Hopkins University Press 1966)

[172] Ibid, 2 et seq.

[173] Ibid. For more examples of the development of this type of law during the Ottoman Empire see M. Khadduri, 'Islam and the Modern Law of Nations' (1956) 50(2) *AJIL* 358, 360 *et seq*, and G. M. Badr, 'A Survey of Islamic International Law'(1982) 76 *American Society of International Law. Proceedings* 56

[174] M. Khadduri, 'Islam and the Modern Law of Nations', 370-371; also referring in ft 42 to the work of A.W. Dejany, 'Competence of the General Assembly in the Tunisian-Moroccan Questions' (1953) *Proceedings of the American Society of International Law* 53-59, on the competence of the UNGA to deal with Muslim countries. It is important, however, not to underestimate that the concentration of international power still rests with the West, whose political powers still determine access to 'the club of civilisation' (to use a non-academic expression). On this see inter alia Meltem Müftüler−Bac, 'Through the looking glass: Turkey in Europe' (2000) 1.1 *Turkish Studies* 21; Karen Culcasi, 'Constructing and naturalizing the Middle East' (2010) 100.4 *Geographical Review* 583; Luke Struckman and Tristan Sturm, 'Introduction: Interrogating Conventional Geopolitics of the Middle East' (2012) 16(1) *The Arab World Geographer* 3. And of course Said, *Orientalism*

[175] Shaheen Sardar Ali and Javaid Rehman, 'The Concept of Jihad in International Islamic Law' (2005) 10(3) *Journal of Conflict & Security Law,* 321, 333 et seq

[176] Fadl, 'International Law, Regional Developments: Islam', 9. He lists three prominent Islamic jurists that support the view that the category of *dar al-harb* became obsolete: Mahmud Shaltut (rector of al-Azhar Mosque University), in *Muhammad's Mission and Warfare in Islam* (1933) and *The Qura'n and Warfare* (1948); Muhammad Abu Zahra (professor of law at Cairo University), in *International Relations in Islam* (1964); and Wahba al-Zuhayli (member of the Islamic law committee of the Organisation of the Islamic Conference – OIC), in *International Relations in Islam: A Comparison with Modern International Law* (1981)

universal rules'.[177] Thus, Islamic law protects international agreements, provided that the particular obligations are consistent with the principles of *shari'ah.* As such, as argued by Rehman, Islamic international law (*siyar*) has contributed to the development of PIL.[178]

Where does this leave Islamic law in relation to the remaining non-treaty-based sources of PIL as outlined in Article 38 of the ICJ Charter?[179] In principle, from the international law angle, there is no justification to marginalise the contribution of Islamic legal thought and practice with regards to customary international law, general principles of law, case law and scholarly writings. In fact, however, more frequent references to it would lead to a greater sense of inclusion within the international community.[180] The explicit inclusion of Islamic law among the legal systems to consider in the 2004 UN report on *The rule of law and transitional justice*[181] encourages TJ scholars and practitioners to engage with *shari'ah* when relevant.

At least theoretically, the analysis presented by Fadl may be applicable to countries that have accepted the jurisdiction of the ICJ and thus freely entered into an international treaty that binds them to international custom (including *jus cogens*), general principles, select case law and scholarly writings.[182] The Organisation of Islamic Cooperation (OIC) and some of its members have presented written statements to the ICJ when an OIC member was affected.[183] The outstanding problem, however, is the extent of the participation afforded to states with a Muslim-majority population in the identification and application of non-treaty sources of PIL. Important third-world critiques have uncovered neocolonial undertones in PIL.[184] As such, in order for the international paradigm of TJ to remain globally relevant, the inclusion of non-western approaches to international law, including those of Islamic law, is fundamental.

---

[177] Ibid, 11, para 58

[178] Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order* (Hart 2005), 45 et seq

[179] Article 38 lists: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law

[180] With reference to the work of the ICC, see Badar, 'Islamic Law (*Shari'a*) and the Jurisdiction of the ICC'

[181] United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict situations: Report of the Secretary General,* S/2004/616, 23 August 2004, para 61: 'A mix of expertise that includes knowledge of United Nations norms and standards for the administration of justice, experience in post-conflict settings, an understanding of the host country's legal system (inter alia, common law, civil law, Islamic law), familiarity with the host-country culture, an approach that is inclusive of local counterparts, an ability to work in the language of the host country and familiarity with a variety of legal areas'

[182] For example, Egypt, Pakistan, Somalia and Sudan have issued 'Declarations Recognizing as Compulsory the Jurisdiction of the Court', see http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=1&sp3=a [accessed 20 March 2015]; this is in addition to all the ipso facto parties to the ICJ Statute by virtue of Art 93(1) UN Charter

[183] *Legal Consequences of the Construction of a Wall, Advisory Opinion* [9 July 2004] ICJ Rep 136, Written Statement of the Organisation of the Islamic Conference (30 January 2004) and also statements of Saudi Arabia, Egypt, Jordan, Kuwait, Lebanon, Syria, Yemen, Morocco, Indonesia, Sudan, Pakistan and Malaysia available at http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=1 [accessed 20 March 2015]

[184] For example, regarding general principles, M. Cherif Bassiouni, 'Functional Approach to General Principles of International Law' (1989) 11 *Mich. J. Int'l L.* 768, 782 et seq. In general, see inter alia Antony Anghie, 'Finding the peripheries: sovereignty and colonialism in nineteenth-century international law' (1999) 40 *Harv. Int'l. LJ* 1; Makau Mutua and Antony Anghie, 'What is TWAIL?' (2000) Proceedings of the Annual Meeting, American Society of International Law. On customary international law and jus cogens, the recent Eberechi Ifeonu, 'Customary International Law (CIL) and Jus Cogens in an Expanded International Community: Reflection on the Evolution of International Crimes Subject to Universal Jurisdiction from Third World Perspective' (2014), available at http://works.bepress.com/eberechi_ifeonu/2/ [accessed 12 Jan 2015]

5. Conclusions

This chapter used the notions of formants and cryptotypes to discuss the role of Islamic law in relation to Muslim-majority legal systems, such as those facing TJ in the context of Arab uprisings. By recognising the social function of Islamic law and the agency carried by jurists in expounding the theories of divine norms in given contexts, it is possible to conduct a critical examination of *shari'ah* without the risk of entering theology. In relation to the relocation of TJ from international law paradigms to Muslim-majority legal systems, engaging with Islamic law as a formant of those settings may respond to the calls for integration of religious principles in the process by the local beneficiaries. While no precise definition of Islamic law was provided, its analysis offers tools to understand it and use it constructively in relation to TJ – as the final chapter of this thesis will explore in more detail.

By analysing Muslim-majority legal systems through the component of Islamic law, this chapter found that its modernising potential has been a constant feature throughout history up to the present day. This enables Islamic law to respond effectively to contemporary societal needs as long as the political leaders and the elite of jurists are committed to pursuing and implementing the common good for society as mandated in *shari'ah*. The example of Al-Azhar's involvement in the TJ debates of Egypt and across the MENA region demonstrates that jurists of religious institutions can make an impact on TJ in relation to the Arab uprisings – at least at doctrinal level. Moreover, in light of the social purposes of Islamic law for both local and international communities, its relationship with PIL can be interpreted from a constructive angle and thus reject blanked assumptions of incompatibility.

With a specific view to the relocation of TJ from the international law paradigm to Muslim-majority legal systems, the analysis de-mystifies our understanding of Islamic law through the lens of the comparative methods. The *shari'ah* is but a formant, and Islamic jurisprudence and legal tradition just cryptotypes, of Muslim-majority legal systems, not a sacred and irrefutable set of religious norms that dominate Muslim-majority legal systems. At the same time, Islamic law constitutes a recognisable normative force in the secular domain of Islamic communities. Therefore, by desacralising – but not desecrating – the normativity of Islamic law in specific contexts, we are free to observe its social function, maintaining our focus on critical legal inquiry, and not on timid theological apology. So 'does Islamic law exist?' – asked Knut Vikør; 'no, and that is why studying it is so exciting' was his short answer.[185] In this spirit, the final chapter will continue to explore how to bridge TJ from international law into Muslim-majority legal settings, where a strategic use of Islamic law may be key to success. This chapter has contributed to resolving the research questions of this thesis by providing an interpretation of Muslim-majority legal systems in which TJ can be relocated. It emerges that Islamic law is inherently creative in the pursuit of the common good (*maslahah*) of the communities it guides, but exploring those possibilities in relation to TJ aims is based on the decision of elite jurists and political leaders to do so.

[185] Vikør, *Between God and the Sultan*, at 1 et seq

VI. Transitional Justice and Legal Truths in Muslim-majority Legal Systems

1. Introduction

The relocation of transitional justice from the international paradigm to Muslim-majority legal systems calls for an engagement with Islamic law as well as political forces that define the process. Increased international attention towards the Arab uprisings encourages a deeper reflection on the possible role of Islamic law in TJ, whether this would ensure a greater cultural ownership by the affected communities, or if, instead, transitional aims would be hindered by religious norms. The temptation to devise a form of 'Islamic transitional justice' to satisfy the presumed cultural needs of the beneficiary population should be resisted as a form of disingenuous concession by international donors, or as an expression of local political interests cloaked in religious language. Accepting without critique certain versions of Islamic law risks placing 'Western adherents of cultural relativism or Orientalism' on 'the side of the undemocratic governments'.[1] Instead, local and international actors can jointly develop forms of TJ that fit the requirements of the international paradigm and *shari'ah* to suit the needs of specific contexts if there is the political willingness to do so.

The simplistic solution to this enquiry is to acknowledge that each Muslim-majority TJ context is different, and no general propositions on the engagement of Islamic law should be advanced from the outside. Nevertheless, some further considerations on the employment of Islamic law as part of TJ processes can be made to ensure the potential of *shari'ah*-based norms and practices are not discarded if they support and strengthen transitional aims and the applicable international legal framework. Building on the elements presented and analysed earlier, this chapter will not provide one-size-fits-all answers, but point to some general possibilities offered by Islamic law in TJ that may be explored further – in theory and practice alike.

The first three chapters of this thesis discussed the international paradigm of TJ based on IHRL, ICL and (to a lesser extent) IHL, focusing on the notions of collective memory, legal truths and the right to the truth as cornerstones of the transitional process. Chapter 4 considered comparative law approaches to translating international understandings of TJ into specific local settings, and in particular Muslim-majority societies. Then, chapter 5 considered the main formants of Islamic legal systems as relevant to TJ. This final chapter will address three unresolved questions: (1) can Muslim-majority legal settings accommodate international law based TJ processes, and how? (2) Are Islamic law mechanisms able to uncover legal truths about past abuse and thus contribute to historical TJ? (3) Is the emerging right to the truth (as a cornerstone of TJ) resonant in Islamic legal systems? And if so, can Islamic jurisprudence contribute to the global consolidation of the right to the truth? In answering the core research questions, this chapter analyses specific overlaps between the international paradigm of TJ and Islamic law which guide the relocation of TJ in Muslim-majority settings. It also explores specifically how Islamic law can inform the notions of legal truths and the right to the truth, which in turn contributes to the establishment of a global paradigm of TJ based not only on IHRL, ICL and IHL, but also local understandings of justice and unofficial norms around the world, of which *shari'ah* is but one example.

[1] Ann Elizabeth Mayer, 'Universal versus Islamic Human Rights: A Clash of Cultures or Clash with a Construct' (1993) 15 *Mich J Intl L* 307, 403 et seq

2. Transitional Justice from International to Muslim-majority Legal Systems

This thesis outlines how the international framework of TJ draws on IHRL, ICL and IHL alongside state law and, notably, unofficial local law, including religious norms. It also considered how local understandings of justice inform the relocation of TJ from international law to local settings, from a comparative law angle. The final chapter goes back to the notions of legal truths and right to the truth explored previously, and investigates how unofficial norms emerging from Muslim-majority legal systems contribute to the global paradigm of TJ, addressing the second part of the overall research question in more detail.

Translating TJ into local social and legal language may contribute to facilitating its process. Therefore, taking into account the specificities of each experience and contexts of application in Muslim-majority settings, the three questions to ask in designing and implementing a mechanism are: (1) does this mechanism serve the aims of the transition? (2) does this mechanism meet the standards set out in PIL, and in particular IHRL? (3) does this mechanism fit the requirements of Islamic law which are held by the society facing TJ, and do the principles of Islamic law meet IHRL standards? If the answer is three times affirmative, then the mechanism may stand a chance of success. This chapter refers broadly to the third question and invites further case-study research on the matter.

The compatibility between Islamic and international law is a prominent hurdle to address in the localisation of TJ in Muslim-majority settings. Islamic law has been found to be compatible with PIL in general as well as with IHRL, IHL and ICL provisions; any remaining tensions can be discussed and negotiated. Nevertheless, concerns may still be raised by both international lawyers and Islamic lawyers that the meeting of the two systems is problematic. The former may assume that the latter's system is excessively oriented towards the imposition of harsh punishments, the exclusion of women and non-Muslims from the process, and the tendency to theocratise instead of democratise. The latter, instead, may fear that the former will denature the cultural values of a Muslim society, impose external forms of justice that will promote vice and ultimately be framed in a normative language alien to the beneficiary community. In order to counter preconceptions and sentiments of suspicion, as Baderin would say, 'with good faith everything can be discussed'.[2] As such, the decision to explore the compatibility between the international paradigm of TJ and Islamic law is essentially political.

Numerous authors have analysed and even celebrated the relationship between human rights and Islamic law.[3] Based on a review of that work and the understanding that Islamic law is inherently flexible, it is possible to ascertain a general compatibility between the two systems. Although specific tensions may remain in areas of fundamental importance for TJ – notably, the harshness of certain forms of punishment for the *hudud* crimes, and the unequal status of women in personal status laws and in testimony – notable efforts have been made to ensure alternative interpretations to mainstream understandings. The system's unattainably high standards of proof requirements suggest that there is no imperative under Islamic law to

---

[2] Mashood A Baderin, 'Religion and International Law: Friends or Foes?' (2009) 5 *European Human Rights Law Review* 637

[3] *Inter alia*: Mashood A Baderin, *International human rights and Islamic law* (OUP 2003); Abdullahi Ahmed An-Na'im, *Toward an Islamic reformation: civil liberties, human rights, and international law,* (Syracuse University Press 1996); Ann Elizabeth Mayer, *Islam and human rights: Tradition and politics* (Westview Press 1991)

impose inhumane punishments (including the death penalty).[4] Likewise, gender inequality can be redressed in light of renewed textual exegesis and contemporary human rights advancements, as attested by the diversity of interpretation across Muslim-majority settings.[5] Therefore, discrepancies between the IHRL requirements of TJ and Islamic law principles which appear, upon first reading, to fall short of international standards, can and should be addressed doctrinally in scholarship as well as politically to explore possible synergies.

An unresolved limitation of Islamic law vis-à-vis IHRL applicable to TJ is the lack of a readily discernible corpus of Islamic human rights law which reflects the centrality of human rights principles in Islam. Mayer addressed the question of whether Islamic culture mandates a distinctive approach to human rights over two decades ago, opposing Huntington's clash of civilisations thesis and suggesting instead that Muslim human rights documents are determined more by politics than divinity.[6] She does not, however, discuss similarities or differences with regards to human rights law, understood as the special relationship between the individual and the state, which leaves the question as to the distinctiveness of an Islamic form (as opposed to Islamic substance/principles) of human rights open. Borrowing from Rawls' doctrine of 'overlapping consensus' (i.e. the decision to focus on the end results of different processes starting from contrasting theoretical justifications[7]) Bielefeldt adds to Mayer's position by rejecting (passive) lowest common denominator approaches in favour of (proactive) 'changes, self-criticism, and reform' to enable human rights.[8] He also underlines that human rights 'cannot compete with cultural and religious traditions' because their focus is on 'political and legal justice'.[9]

In discussing the relocation of TJ from the international paradigm to Muslim-majority settings, this chapter relates to two aspects of the relationship between IHRL and Islamic law. Firstly, as TJ draws heavily on PIL, human right standards establish a framework of reference. Secondly, the emergence of the right to the truth as a distinctive feature of TJ is contextualised in IHRL. As such, Islamic law interacts at a general level with the IHRL framework of TJ and more specifically with the right to the truth. But although the normative aspirations theoretically converge, Islamic law and jurisprudence (or any other religious-traditional normative system) may be insufficient in providing a discrete and exact comparator to IHRL in the context of TJ and more generally. Instead, a comparison is made possible on the basis of content. As noted by Bielefeldt:

---

[4] See *inter alia* Mohammad Hashim Kamali, 'Punishment in Islamic law: A critique of the hudud bill of Kelantan, Malaysia' (1998) 13(3) *Arab Law Quarterly* 203; and also Rana Hajaj Ahmaid Alsoufi, 'Strategies for the justifications of Ḥudūd Allah and their punishments in the Islamic tradition' (2012) Edinburgh Research Archive https://www.era.lib.ed.ac.uk/handle/1842/7989 [accessed 25 November 2014]

[5] For instance: Asma Barlas, *Believing women in Islam: Unreading patriarchal interpretations of the Qur'an* (University of Texas Press 2009)

[6] Mayer, 'Universal versus Islamic Human Rights' 402

[7] John Rawls, 'The Idea of an Overlapping Consensus' (1987) 7(1) *OJLS* 1

[8] Heiner Bielefeldt, '"Western" versus "Islamic" Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights' (2000) *Political Theory* 90, 114 et seq

[9] Ibid, 116

> The idea of human dignity that can connect human rights with different religious, philosophical and cultural traditions because the insight into the unalienable dignity of every human being constitutes both the basic ethical principle of human rights and a central element of the teachings of various religions and philosophies.[10]

One must resist the temptation to talk about a separate notion of Islamic human rights, for (1) there seems to be no identifiable (formal) corpus of such law and (2) even if there were, the gap between the religious aims of *shari'ah* and the political aims of TJ law prevent interchangeability – although in effect the ends of both might equally promote transitional aims. So how can the compatibility between Islamic law and TJ be ascertained? The proposed solution to this impasse is to draw from Islamic criminal law as a more readily discernible corpus of law applicable to TJ. Discussions on TJ in the MENA region[11] indicate that the remedies of criminal justice are relied on much more than human rights, which are generally non-justiciable in domestic courts in the region.

From the international TJ paradigm angle, the choice of criminal justice principles over human rights as a comparator in Islamic law is insignificant: the aim of the comparison is to consider the similarities between the international framework of TJ and a legal system (made up of various components) which does not originate from PIL. As demonstrated earlier in this thesis, the interconnection between ICL and IHRL in TJ is apparent, the provisions now contained in the Rome Statute are guided by human rights considerations and both are used in furthering transitional goals. Moreover, the aims of ICL specifically feed into TJ when they include 'the telling of the history of a conflict, (…) reconciling societies and capacity building in domestic judicial systems'.[12] This links into the centrality of truth-seeking in TJ discussed previously, which is guided mostly by IHRL but also informed by ICL.

On the basis of these considerations, there are sufficient relevant norms in Islamic law, which includes Islamic criminal justice, to compare with the legal provisions of the TJ international paradigm which draws on the interconnected rules of IHRL and ICL (as part of PIL). Furthermore, the rich literature on Islamic criminal law and ICL from an Islamic perspective[13] takes into account IHRL developments and TJ themes. Although this scholarship tends to present itself as apologetic, it uncovers a wealth of arguments demonstrating the compatibility of *shari'ah* with ICL and is thus relevant to TJ contexts.

2.1 The overlap of substantive aims of Islamic law and ICL/IHRL

Writing about the international criminal justice system seen from the perspective of Islamic *shari'ah*, Adel Maged provides a list of shared objectives:

> – To prevent the commission of serious crimes and acts of aggression;
> – To bring to justice persons allegedly responsible for committing such grave crimes;
> – To protect the civilians and other protected groups;
> – To render justice to the victims;
> – To deter criminals from committing crimes;

---

[10] Ibid

[11] In conversations held in Egypt and Palestine

[12] Robert Cryer et al, *An introduction to international criminal law and procedure* (CUP 2007), 17, citing Antonio Cassese, 'Reflections on international criminal justice' (1998) *MLR* 1, 6-7

[13] Inter alia M Cherif Bassiouni, *The Islamic Criminal Justice System* (Oceana Publications, 1982); Matthew Lippman, 'Islamic criminal law and procedure: religious fundamentalism v. modern law' (1989) 12 *BC Intl and Comp L Rev* 29

– To contribute to the restoration of peace by achieving justice and promoting reconciliation".[14]

This tentative list suggests that Islamic criminal law is arguably compatible with the core purposes of ICL itself (and other systems) – bearing in mind that the peculiarity of the latter involves dealing with mass criminality.[15] The main goals of ICL are retribution and deterrence, as well as rehabilitation of the offenders,[16] which are comparable to those proposed by Maged for Islamic criminal law.

As noted above, given the links between ICL and IHRL in the context of TJ, the rich literature on human rights and Islamic law informs this comparative analysis.[17] The conventional distinction between categories of crimes under Islamic law is threefold: *hudud*, *qisas* (*diyya*) and *ta'azir*. Though this classification is religious, it also reflects socio-political interpretations of criminal justice which in turn have determined the punishments applicable to each offence.

Hudud crimes are considered to be crimes against god, are prescribed in the Qur'an and *Sunna*, and constitute the backbone of the Islamic criminal order.[18] This group includes six/seven specific crimes (though there are differences of opinion among the four Sunni schools and with the Shia scholars): apostasy, transgression (*baghi*)[19], theft, highway robbery, adultery (*zina*), slander, drinking alcohol. The penalties for these types of crimes are considered excessively harsh by contemporary standards, as they include corporal punishments as well as the death penalty; a procedural remedy to this is that the standard of proof for these crimes is set at a particularly high threshold.[20] The application of the *hudud* offences has become highly political and their reintroduction in certain Muslim-majority societies has been deeply divisive.[21] With regards to TJ, enforcing *hudud* penalties would most likely result in inhumane forms of punishment inflicting

---

[14] Adel Maged, 'Arab and Islamic Shari'a Perspectives on the Current System of International Criminal Justice' (2008) 8(3) *ICLR*, 484

[15] For an overview of the aims of ICL, see *inter alia* Cryer, *An introduction to international criminal law,* 17-36

[16] Ibid, 18 et seq, citing the cases of *Aleksovski* ICTY A Ch. (24th March 2000), para 185 and *Momir Nikolić* ICTY T. Ch. I (2nd December 2003), para 85

[17] See, *inter alia*, Abdullahi Ahmed An-Na'im, 'Islam and Human Rights: Beyond the Universality Debate', in American Society of International Law, Proceedings of the 94th Annual Meeting (2000); Mashood A Baderin, *International Human Rights and Islamic Law* (OUP 2003); Bassam Tibi, 'Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations' (1994) 16 Hum Rts Q 277; Ann Elizabeth Mayer, *Islam and Human Rights*; Mohammed Hashim Kamali, 'Fundamental Rights of the Individual: An Analysis of Haqq (Right) in Islamic Law' (1993) 10(3) *The American Journal of Islamic Social Sciences* 340. Beyond the English-language academic setting, see, *inter alia*, Hatem Elliesie (ed), Beiträge zum Islamischen Recht VII: Islam und Menschenrechte/Islam and Human Rights (Peter Lang 2010)

[18] For an overview of the *hudud* crimes see MC Bassiouni, 'Crimes and the Criminal Process' (1997) 12(3) *Arab Law Quarterly*, 269; Matthew Lippman, Sean McConville, and Mordechai Yerushalmi, Islamic Criminal Law and Procedure: An Introduction (New York: Praeger, 1988); MH Kamali, 'Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia' (1998) 13 *Arab Law Quarterly* 203*,* 218 et seq

[19] Baghi in Arabic language and Islamic *Shari'ah* is the transgression or rebellion against the legitimate leader by the use of force. For a detailed discussion of this topic, see Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (CUP 2001), 8 et seq

[20] On the harshness of punishments for the *hudud* crimes, and high standards of proof, see Baderin, *International Human Rights and Islamic Law*, 75 et seq

[21] With reference to Malaysia see inter alia Kamali, 'Punishment in Islamic law'; Maria Luisa Seda-Poulin, 'Islamization and Legal Reform in Malaysia: The Hudud Controversy of 1992' (1993) *Southeast Asian Affairs* 224. And with reference to Nigeria: Vincent Obisienunwo Orlu Nmehielle, 'Sharia law in the northern states of Nigeria: To implement or not to implement, the constitutionality is the question' (2004) 26(3) *HRQ* 730. Ogechi E Anyanwu, 'Crime and justice in Postcolonial Nigeria: The justifications and Challenges of Islamic Law of Shari'ah' (2006) *Journal of Law and Religion* 315

physical pain, which would probably violate the prohibition of torture as set out in the CAT (Article 1) and the ICCPR (Article 7).[22]

Besides the problematic execution of *hudud* penalties in light of ICL and IHRL, the very fact that these crimes are considered the gravest of all crimes may pose a challenge to the aims of TJ and the requirements of human rights. For example, *zina* – the punishment of extramarital sexual relations – has been understood by some conservatives as encompassing instances of rape and gender-based assault.[23] This approach is completely out of tune with IHRL and with regards to TJ,[24] given the gravity of GBV as part of conflict and widespread abuse, and its recognition as a war crime in IHL and ICL.[25] Although not much has been said about the relationship between the *hudud* crime of *zina*, GBV and TJ, it is clear that traditional patriarchal readings require a radical shift, if this area of Islamic law is to comply with the principles of human dignity upheld by *shari'ah* as well as applicable IHRL standards (and of course the survivor's right to see justice done and uncover the truth about their pain in a socio-political context).

Another example of the challenges posed by the application of *hudud* crimes in transitional justice settings is related to *baghi* – transgression, or revolt against the righteous leader, described by Al-Azhar:

> Baghi in Arabic language and Islamic Shari'a is the transgression or rebellion against the legitimate leader by the use of force. The crime of baghi includes for example the outset of the ruler by the use of force and violence and acts of destruction of public property.[26]

Unlike *zina*, this *hudud* crime has recently faced a radical reinterpretation from within the Islamic establishment in relation to the Arab uprisings.[27] The senior Al-Azhar scholars and other intellectuals responded publicly to ensure that the protestors against Mubarak were not considered as having committed *baghi* – which in the present-day Egyptian legal system heavily reliant on *shari'ah* may have resulted in religiously-motivated public condemnation and the imposition of corporal (and capital) punishments. The Al-Azhar Declaration in Support of the Arab Revolutions of 31 October 2011 eagerly provides the following analysis to protect protesters:

---

[22] International Covenant on Civil and Political Rights, United Nations General Assembly resolution 2200A (XXI) (16 December 1966). Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 39/46 (10 December 1984)

[23] See discussion, for instance, in Rubya Mehdi, 'The offence of rape in the Islamic law of Pakistan' (1997) 18 Women Living under Muslim Laws: Dossier 98. Asifa Quraishi, 'Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective' (1997) 18 *Mich. J. Int'l L*. 287

[24] *Inter alia* Christine Bell, and Catherine O'Rourke, 'Does feminism need a theory of transitional justice? An introductory essay' (2007) 1(1) *IJTJ* 23. Katherine M Franke, 'Gendered subject of transitional justice' (2006) 15 *Colum J Gender and L* 813. Kirsten Campbell, 'The gender of transitional justice: Law, sexual violence and the International Criminal Tribunal for the Former Yugoslavia' (2007) 1(3) *IJTJ* 411. Fionnuala Ní Aoláin, 'Women, security, and the patriarchy of internationalized transitional justice' (2009) 31(4) *HRQ* 1055

[25] See *inter alia* Theodor Meron, 'Rape as a crime under international humanitarian law' (1993) *AJIL* 424; Catharine A MacKinnon, 'Rape, genocide, and women's human rights' (1994) 17 *Harv Women's LJ* 5; Catherine N Niarchos, 'Women, war, and rape: Challenges facing the international tribunal for the former Yugoslavia' (1995) 17(4) *HRQ* 649. Richard J Goldstone, 'Prosecuting Rape as a War Crime' (2002) 34 *Case W Res J Intl L* 277; Tamara L Tompkins, 'Prosecuting rape as a war crime: Speaking the unspeakable' (1994) 70 *Notre Dame L Rev* 845

[26] The Al-Azhar Declaration in Support for the Arab Revolutions, 31 October 2011, Adel Maged and Alice Panepinto trs, available at www.dur.ac.uk/ilm [accessed 30 June 2013], fn 2

[27] Ibid, also The Al-Azhar Document on the Future of Egypt (Al-Azhar and a group of Egyptian Educated elite), 21 June 2011, available in English at http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?ArtID=56424 [accessed 30 June 2013]

> When the voice of national popular opposition and peaceful protest arises, this is the inherent right of people to correct and guide their rulers when they (…) ignore legitimate demands which call for freedom, justice and equity. Those patriotic protestors are not considered as committing baghi; (…) national peaceful movements constitute the core of human rights in Islam, as confirmed by all international conventions. Furthermore, it is the people's duty to reform their society and correct their rulers.[28]

This passage is both politically significant and legally striking: the Al-Azhar scholars link the right to peaceful protest to the understanding of human rights in Islam and in international law – actually referring to the duty of civil dissent in the face of authoritarianism. Doctrinally, it raises the expectation that similar reform will be pursued by Islamic lawyer-theologians with regards to other *hudud* crimes which are relevant to TJ (including *zina*) in light of IHRL standards. Indeed, the choice of arguments in revising the commonly held view of *baghi* is noteworthy: Al-Azhar instrumentally employs a *shari'ah* based argument alongside an IHRL argument, without hesitating as to the full compatibility of the two normative systems. This example, however, also reveals the deeply political character of Al-Azhar as an institution and, relatedly, in its willingness to take sides in situations leading to TJ.

The second category of crimes in Islamic law, *qisas*, regulates murder, manslaughter, battery and other crimes against the physical integrity of the person.[29] The primary sources of Islamic law (Qur'an and Sunna) do not set out specific or mandatory penalties for these, but the wrong is regulated at human level, either through the 'talion law' (eye for an eye) or *diyya*, victim compensation.[30] Unlike *hudud* crimes, these crimes 'infringe upon the claims of human beings' and not of god.[31] Therefore, the victim or his family have the right to pardon the perpetrator, in addition to the right to request blood money or other forms of compensation. The peculiarity of *qisas* is the discretion left to the victim and their family in determining and applying the penalty to the perpetrator. In stark contrast to the management of criminal justice in European jurisdictions – which place criminal law within the sphere of public law – the Islamic crimes of *qisas* are set out as a private law relationship between offender and offended parties. The participation of families in the resolution of the dispute and the application of the penalty, however, renders this type of crime a semi-public matter, elevating it beyond what may be viewed as a prima facie private affair. In that regard, it is worth noting again that the imposition of harsh corporal punishment is at odds with IHRL – but it is not an imperative. Thus, for Muslim-majority states undergoing transition that have ratified the core IHRL the decision to leave the resolution of offences against the person to private forms of justice may simply reveal a political unwillingness to uphold international obligations. This category of crime may also carry a hidden potential in relation to restorative justice as well as its role in acknowledging the truth about past abuse.[32] As such, by reinterpreting the right to *diyya* of a victim and her family under *qisas* from an IHRL perspective, it

---

[28] Ibid 'second'

[29] Bassiouni, 'Crimes and the Criminal Process', 269 et seq

[30] Ibid

[31] Silvia Tellenbach, 'Islamic Criminal Law' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2014)

[32] On the role of restorative justice and *qisas*, see Susan C Hascall, 'Restorative Justice in Islam: Should Qisas Be Considered a Form of Restorative Justice' (2011) 4 *Berkeley J Middle E & Islamic L* 35; and Rahma Abdulkadir and Caroline Ackley, 'The Role of Shari'a-Based Restorative Justice in the Transition from Armed Conflict to Peacebuilding: Do Somalis Hold the View That the Restorative Justice Aspects within Qisas Offer a Solution?' (2014) 14(2) *Northeast African Studies* 111

may include the right to know the truth and the related state obligation to carry out effective investigations (instead of applying the talion law).

The third category of Islamic crimes, *ta'azir,* describes residual – yet potentially infinite – offences against community interests or public order 'punishable by penalties left to the discretion of the ruler or the judge'.[33] These include certain criminal acts related to the *hudud* but not amounting to *hudud*, or that do not pass the standard of proof test, as well as 'all acts under the provisions of law, which are not punished by *hudud*'.[34] It is under this category that one may place the bulk of statutory criminal provisions in many Muslim countries. With regards to TJ, the *ta'azir* crimes pose no unsurmountable challenge to IHRL requirements, inasmuch as their application does not involve religious imperatives, just purely political obstacles. Therefore, no divine argument can trump the necessity of aligning *ta'azir* to IHRL as applicable in TJ contexts: this category is a pure expression of secular politics.

The three categories of criminal offences described above are understood and supplemented by a multitude of legal maxims (*al-qawa'id al-fiqhiyah*) (that Sacco may call cryptotypes – as described in chapter 4 of this thesis), that offer an indication as to the general principles of law that support the judicial function and highlight the key objectives of Islamic law.[35] Different schools of Islamic jurisprudence reflect the nuances of diverse interpretations of the holy sources and early applications of *Shari'a*.[36] It ought to be noted however, that legal maxims are a result of the work and views of (human) Muslim jurists and not holy revelations *per se*; thus, as suggested by Sadiq Reza, they are 'truly opinions rather than judgments; they are approximations or understandings of God's law rather than definitive statements of it'.[37] In light of this, they may be employed as supplementary arguments if appropriate to the aims of TJ and the standards of IHRL. But as they do not constitute a religious imperative, there is no requirement to uphold them.

2.2 The convergence of procedural standards of Islamic law and ICL/IHRL

Additional arguments have been put forward to illustrate the overlap between core procedural principles of Islamic criminal law and IHRL-sensitive ICL. Writing in relation to the ICC, Mohamed Elewa Badar identifies three principles and two defences in ICL which resonate with the *shari'ah*, and are, in turn, relevant to the international TJ paradigm. These are: the principle of legality and non-retroactivity, the presumption of innocence, and equality before the law; the defence of superior orders and official capacity immunity.[38] In human rights terms, the right to a fair hearing and due process as set out in Article 14 ICCPR, as well as Articles 6, 7, 8, 9, 10 and 11 UDHR have been analysed and found compatible with the principles of Islamic law by numerous comparative scholars such as Mashood Baderin[39] and Sultanhussein Tabandeh.[40]

---

[33] Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the ICC', 414. See also Lippman, 'Islamic Criminal Law and Procedure', 44

[34] Ibid

[35] Ibid, 416 et seq

[36] See *inter alia* NJ Coulson, *History of Islamic Law* (Edinburgh University Press 1964)

[37] S Reza, 'Torture and Islamic Law' (2007-8) 8 *Chicago Journal of International Law* 21, 26

[38] Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the ICC', 419 et seq; MC Bassiouni, 'The Sharia, Islamic Law, and Post-Conflict Justice' (distributed at the 11th Specialization Course in International Criminal Law, International Institute of Higher Studies in Criminal Sciences (ISISC) Siracusa, 2011) at 42 et seq

[39] Baderin, *International Human Rights and Islamic Law*, at 97 et seq (Sunni background)

[40] S Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights* (1970) (Shia background)

The following paragraphs present the most significant procedural overlaps between Islamic criminal law and the ICL principles of the TJ framework, which may be used to design TJ initiatives that meet the requirements of both.

The principle of *nullum crimen sine lege* is enshrined in article 22 of the Rome Statute;[41] in the Islamic tradition, it is reflected in the Qur'anic verses 17:15,[42] 28:59,[43] 4:165,[44] 6:19,[45] and 5:98,[46] and supported in a number of legal maxims and in the traditions of the Prophet.[47] Given their nature and source derivation, *hudud* crimes must respect the principle of legality, as do the *qisas*, through fixed procedures and punishments.[48] Conversely, the *ta'azir* crimes do pose a *prima facie* concern given the wide discretion accorded to the rulers (and law-makers) and judges. However, this criticism has been rebutted in favour of the flexibility needed to deal with residual crimes.[49] Moreover, it could be argued that this category operates in practice on a statute-based model, thus incorporating the guarantees of the principle of legality: the ruler (or Parliament) in his/her legislative capacity would draft a criminal norm to reflect social needs, then it would be implemented through executive capacity, and enforced by the judiciary *after* the normative provision comes into force. Thus, following the structure of the creation of a *ta'azir* crime as set out in classical terms, and adapting it to contemporary realities, it would not appear inconsistent with the requirements of the principle of legality, which could in fact be imported into the process and become an integral part of it.

The presumption of innocence until proven guilty is set out in article 66 of the Rome Statute.[50] In the same spirit, under Islamic law, Badar reports, 'no one is guilty of a crime unless his guilt is proved through lawful evidence'.[51] With specific reference to the *hudud*, the presumption of innocence is upheld in a *hadith*

---

[41] Art. 22 Rome Statute (*Nullum crimen sine lege)* must be read in conjunction with Art. 23 (*Nulla poena sine lege*) and art. 24 (*Non-retroactivity ratione personae*) of the Rome Statute, components and corollaries of the principle of legality

[42] *Qur'ān* in *sūrat al-Isrā*': (Allāh) said: 'Be thou among those who have respite' (17:15) [Ali translation]. Cited in Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* 42, explaining that 'the accused must first be given the opportunity to know the law, and thus no punishment can be imposed without prior law'

[43] *Qur'ān* in *sūrat al-Qasas*: 'Nor was thy Lord the one to destroy a population until He had sent to its centre a messenger, rehearsing to them Our Signs; nor are We going to destroy a population except when its members practice iniquity' (28:59) [Ali translation]. Cited in Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* 42, explaining that "establishment of the law and its divulgation (notice) must precede its application"

[44] *Qur'ān* in *sūrat al-Nisā'*: 'Messengers who gave good news as well as warning, that mankind, after (the coming) of the messengers, should have no plea against *Allāh*: For *Allāh* is Exalted in Power, Wise' (4:165) [Ali translation]. Cited in Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* 42

[45] *Qur'ān* in *sūrat al-Ancām*: 'Say: "What thing is most weighty in evidence?" Say: "*Allāh* is witness between me and you; This Qur'an hath been revealed to me by inspiration, that I may warn you and all whom it reaches. Can ye possibly bear witness that besides *Allāh* there is another *Allāh*?" Say: "Nay! I cannot bear witness!" Say: "But in truth He is the one *Allāh*, and I truly am innocent of (your blasphemy of) joining others with Him" (6:19)' [Ali translation]. Cited in Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* 42

[46] *Qur'ān* in *sūrat al-Mā'idah*: "Know ye that *Allāh* is strict in punishment and that *Allāh* is Oft-forgiving, Most Merciful" (5:98) [Ali translation]. Cited in Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* 42

[47] As cited by Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the ICC', 419. See also Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* 41 et seq

[48] Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the ICC', 420

[49] Ibid

[50] The full text reads: Art. 66 (*Presumption of innocence*) encompasses the principle of 'innocent until proven guilty' (66.1), placing the onus on the prosecution (66.2) and setting the standard of proof sought by the court 'beyond reasonable doubt' (66.3)

[51] Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the ICC', 421, 427, the reported legal maxims: 'certainty is not overruled by doubt'; 'the norm of [Shari'a] is that of non-liability'

transmitted by Aisha.[52] Consistently, 'it is also a well-established principle in *qisas* crimes […] that circumstantial evidence favorable to the accused is to be relied upon, while if unfavorable to him it is to be disregarded'.[53] The same is also applicable to the *ta'azir*.[54] Bassiouni reports that in the Farewell Sermon, the Prophet said: 'Your lives, your property, and your honor are a sacred trust upon you until you meet your Lord on the Day of Resurrection', which some interpret as evidence of a requirement for 'positive proof of crime' to interfere with an individual's interests and freedoms.[55] According to the hadith 'everyone is born inherently pure', teamed with the legal principle of *istishab* (presumption of continuity), Baderin argues that under the Islamic legal tradition 'an accused person is considered innocent until the contrary is proved'.[56] Similar arguments are found in the recent study on doubt in Islamic criminal law by Intisar A. Rabb.[57] Article 19(e) of the OIC Cairo Declaration on Human Rights in Islam also reaffirms the presumption of innocence. Thus, as this principle can be found in Islamic law, the international paradigm of TJ based on ICL would not raise questions of compatibility in that instance.

The presumption of innocence in Islamic law, moreover, is corroborated by the related 'right to compensation of a person who suffers injury or is punished through judicial error or miscarriage of justice' which is recognised in the Islamic legal tradition.[58] This point is especially relevant in the context of TJ, in which the course of justice may be affected by the turn of political events to the detriment of certain people involved in trials. The significance of the existence of the right to compensation for wrongful conviction in the Islamic legal tradition suggests that states may not hide behind Islamic injunctions for their decision or failure to provide compensation, and it may very well be argued by Muslim voices in positions of authority or impact that the right to compensation in these cases is in fact mandated.

Equality before the law is enshrined in the UDHR,[59] in the ICCPR[60] and in numerous subsequent international law documents, and thus applies to the international paradigm of TJ. Likewise, as stated in the Qur'an, crimes, punishments and criminal proceedings must apply equally, in order to limit the judge's discretionary power.[61] Moreover, as noted by Baderin, 'the Prophet himself and the righteous Caliphs after

---

[52] 'Avoid condemning the Muslim to *Hudud* whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imam errs it is better that he errs in favour of innocence [pardon] than in favour of guilt [punishment]' cited in Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* 43

[53] Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* 43, and Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the ICC', 421, citing Intisar A Rabb, 'Islamic Legal Maxims as Substantive Canons of Construction: Hudud – Avoidance in Cases of Doubt' (2010)*17 Arab Law Quarterly* 63, 64-5

[54] Ibid

[55] Ibid

[56] Baderin, *International Human Rights and Islamic Law,* 110

[57] IA Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (CUP 2014)

[58] Baderin, *International Human Rights and Islamic Law,* at 110

[59] Art. 7

[60] Art 14

[61] Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* 44 et seq, citing: *Qur'ān* in *sūrat al-Nisā'*: 'O mankind! Reverence your Guardian-Lord, who created you from a single person, created, of like nature, His mate, and from them twain scattered [like seeds] countless men and women; - reverence Allāh, through whom ye demand your mutual [rights], and [reverence] the wombs [That bore you]: for Allāh ever watches over you.' (4:1) [Ali translation]
Qur'ān in *sūrat al-Hujurāt*: 'O mankind! We created you from a single [pair] of a male and a female, and made you into nations and tribes, that ye may know each other [not that ye may despise each other]. Verily the most honoured of you in the sight of Allāh is [he who is] the most righteous of you. And Allāh has full knowledge and is well acquainted [with all things].' (49:13) [Ali translation]

him demonstrated the principle of equality before the courts and tribunals both in words and in deeds'; for instance, Caliph Umar reprimanded a judge for treating him more favourably due to his status and political power.[62] This suggests that in Islamic law political elites do not fall outside the scope of applicable law, much like the standards set out in the international paradigm of TJ.

The principle of equality before the courts becomes more problematic when women are giving evidence, given the Qur'anic verse indicating that a man's testimony is equal to that of two women.[63] However, Baderin points to two main factors to challenge this proposition: firstly, the context of this verse seems to refer specifically to commercial transactions, typically conducted between men at the time of Qur'anic revelation; secondly, the rationale behind this rule seeks to serve the interests of substantive justice, and as such can be re-tuned to meet the needs of contemporary society.[64] For instance, this rule has been circumvented by the Pakistani Federal Shariat Court.[65] Therefore, there is scope for reinterpretation to reflect the standards of gender equality necessary in any attempt to uncover the truth as part of TJ efforts – the principle of *maslahah* (discussed in the previous chapter) should be able to accommodate this. Arguably, the economic and social rights taken into account by the international paradigm of TJ provide a reason to uphold the principle of *maslahah* and revise any outstanding gender-discriminatory rules of evidence that hinder the transitional aims of truth, justice and reconciliation.

As to the defence of superior orders, Art 33 of the Rome Statute sets out the ICL rule, which clearly rules out the 'possibility of the plea of superior orders for the most odious and egregious international crimes, i.e. genocide and crimes against humanity, offences which normally involve widespread attack on innocent civilians'.[66] Under Islamic law, it is understood that 'Islam confers on every citizen the right to refuse to commit a crime, should any government or administrator order him to do so'.[67] As such, there seems to be no plausible Islamic justification for non-compliance with the ICL rule which informs the international paradigm of TJ.

The second ICL defence considered by Badar is official capacity immunity, enshrined in the III Nuremberg Principle,[68] and now in Art 27 of the Rome Statute. This provision informs the international paradigm of TJ, which is often used to bring to justice those state officials responsible for grave human rights abuse. In his comparative appraisal, Badar confidently states that 'in Islamic law, there is no recognition of special privileges for anyone and rulers are not above the law'.[69] This approach is supported by the traditions of the Prophet; Caliph Umar reports that the Prophet himself did not expect any special treatment that would place

---

[62] Baderin, *International Human Rights and Islamic Law*, 100

[63] Ibid, 101 citing Q: 2:282

[64] Ibid, 102.

[65] Ibid, citing *Ansar Burney v Federation of Pakistan* [1983] Pakistan Federal Shariat Court, LLD (FSC)

[66] Paola Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law' (1999) 10 *EJIL* 172, 190

[67] AA Maududi, *Human Rights in Islam* (Lahore: Islamic Publications 1977), cited in Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the ICC', 426

[68] The III Nuremberg Principle reads: 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law'

[69] Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the ICC', 426 et seq, drawing on M.H. Kamali, *Shari'a Law: An Introduction*, 2008; and Mawdudi, *Human Rights in Islam*, 1980

him above the law.[70] Therefore, even for this aspect the ICL and Islamic law would be mutually supportive in a transitional justice context dealing with accountability of state officials for gross human rights violations.

To sum up, there seems to be scope for the alignment of Islamic law to the standards set out in IHRL-based TJ in general terms, even when norms may seem to be deeply contested. This section considered how, in the case of *hudud* crimes, radical revisionism of the application of existing norms (specifically, *baghi*) has been undertaken by Al-Azhar scholars in light of the political necessities of the Arab uprisings and with reference to the international paradigm of TJ. As such, other Islamic institutions (as well as Al-Azhar) may follow in actively engaging traditional dogma to adapt it to the reality of present-day TJ based on IHRL standards. With regards to *qisas/diyya*, the private law relationship between offending and offended parties – which may result in unacceptable physical violence (extrajudicial or through the authorities) – requires further political willingness by the state (or political elites in positions of authority during transitions) to uphold existing IHRL obligations to provide a fair trial and eliminate inhuman or degrading punishment. Moreover, this category could be reinterpreted to replace the talion rule with a different form of penalty administered by the authorities. This policy shift would not be hindered by religious imperatives, as both the *qisas* and the *ta'azir* categories do not involve offences against god (conversely to the *hudud*) and may be more flexibly reassessed in political processes (and not necessarily by religious institutions). Moving from substantive aims to procedural rules, this section also considered some of the key procedural overlaps between Islamic law and IHRL/ICL relevant to TJ. The findings suggest that remaining differences can be solved as part of a political choice: Islamic jurisprudence is sufficiently flexible to accommodate a variety of solutions to social needs. As such, the international paradigm of TJ predicated on IHRL, ICL and IHL can be accommodated by Islamic law if there is the will to acknowledge and pursue the existing synergies between the two. Equally, on the basis of the legal principles scrutinised here, there seems to be no specific *shari'ah* exception to the rules that facilitate transitional aims and related international standards. Therefore, there is no cause to ignore Islamic law arguments that converge with the international paradigm in localising TJ in Muslim-majority legal systems.

[70] This is reported in relation to unjustly striking a soldier at the battle of Badr; reported by Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the ICC', 427, citing Maududi

3. Legal truths and historical transitional justice through Islamic law

Legal truth can be derived from legal rituals – in the case of TJ, these will generally be trials and truth commissions – which present similarities to religious rituals. A weakness to be reckoned with, however, is the dominance of narratives promoted by those actors who are in a position to shape the process. And furthermore, the very procedures guiding the process may bring about the duplicitous result of uncovering as well as masking the truth sought in the context of TJ. In transitional Muslim-majority settings, similar (secular) considerations will arguably hold true. This section will outline the means to uncover legal truths in Islamic law, drawing from existing literature on the derivation and formalisation of legal truths, and evaluate their possible use in transitional contexts. To do so, it will consider how Islamic law as a characteristic formant of those legal systems may strengthen historical TJ and the quest for collective memories.

Historically, the written word has played an important role in recognising and regulating relationships between individuals in Muslim-majority settings, inasmuch as documents can be produced to prove a legal title, right or interest before society. For example, in the early *shari'ah* courts, the judge's scribe 'recorded the statements, rebuttals and dispositions of the litigants, and, moreover, drew up legal documents on the basis of the court records for those who needed the attestation of the judge'.[71] Outside the court, private notaries (*shuruti*) drafted legal documents for individuals entering into contracts, upon payment of a fee.[72] These legal documents formed the backbone of the legal narratives both inside and outside the courtroom, with an impact on society that went beyond the individual case or transaction. With reference to TJ, written records of both private and public law (including criminal matters) contribute to uncovering the truth about past abuse and archiving information.[73]

Islamic law practice has also systematised information. Alongside court scribes and private notaries, by the eighth century AD we have reports of established *diwan* and collections of court records (*sijillat*).[74] These included the judge's decision on each case, based on the claims made by the parties, as well as registers including prisoners names and terms of imprisonment.[75] Hallaq has described the *diwan* as embodying 'the complete record of the judge's work in the court, and the chief tool by which judicial practice preserved its continuity'.[76] The *diwan* contained a court's case law, its motivations and supporting documents, and as such it was passed on to successive judges: this allowed the continuation of protracted cases as well as a means to review the work of the predecessor judge, also enabling appeals procedures.[77]

Keeping written evidence of formal legal matters meant, as Hallaq notes, that it could be consulted by others, in relation to the *ratio decidendi* or legal title; however, this necessarily required a truth-seeking effort alongside admission and selection of documents. This also suggests that if an error of fact was incorporated

---

[71] Wael B Hallaq, *The Origins and Evolution of Islamic Law*, 92 et seq

[72] Ibid

[73] On archives and transitional justice, see UNHRC, Twenty-fourth session, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff' (28 August 2013) UN Doc A/HRC/24/42, para 81

[74] Hallaq, *The Origins and Evolution of Islamic Law*, 92 et seq

[75] Ibid

[76] Ibid, 95 et seq

[77] Ibid

in a court record, it acquired the connotations of legal truth for others to rely on (or appeal against) in future proceedings. By recording and filing documents through an established and recognisable process, given legal statuses, rights and interests were awarded authenticity both between parties to a case and at societal level. As such, legal truths could be (and have been) formed and formalised in Islamic legal settings for over twelve centuries, consolidating the parallels between the formation of legal truths in secular and religious systems. This, in turn, enables Islamic law and tradition-informed legal truths to be compared to other types of legal truths (and critiqued accordingly).

Legal truths contribute to the development of narratives which in turn feed into historical TJ processes in building collective memories. With reference to legal truths in Muslim-majority legal systems, Baudouin Dupret and Barbara Drieskens separate 'the law as a topic of inquiry in its own right and legal texts and stories as a resource for social history'.[78] They divide the former between 'law as a tool for further legal practical purposes' (e.g. statutes, jurisprudence, etc.) as 'used by law practitioners (…) to perform their activities', and 'the description of these legal practices in their manifold dimensions, that is the rendering of the many activities that led to the production of the law'.[79] Dupret and Drieskens stress the centrality of understanding legal stories in their context, described as 'the many cultural, institutional, substantive and procedural practicalities, relevancies and technicalities that concurred to constraining the specific course of action'.[80] They argue that legal texts 'are both contextualizing and contextualized'.[81] This echoes the TJ notion that law is both backward-looking and forward-looking in dealing with the past and providing foundations for the future. And much like in non-religious contexts, actors who contribute to constructing legal truths as well as their intended present and future 'audiences' have a role in historical TJ processes. In contrast to those actors, however, in Muslim-majority settings (or any context where religious norms inform politics) political agents with a recognised religious character are likely to enjoy a higher standing in society than mere political actors – as discussed earlier in relation to Al-Azhar.

Discussing the formation of legal narratives in *shari'ah* courts, Brinkley Messick recalls that 'all lawsuits are built of conflicting narratives' and at the conclusion of the litigation, 'the judge's ruling selectively evaluates these conflicting narratives and either finds for one or imposes his own final narrative'.[82] For example, the mid-20th century Yemeni *hukm* (final judgment records) included:

> The opening claim and response texts, any later responses (by either party), primary evidentiary texts (including, as sub-varieties, both oral testimony and a range of written documents, including notarial instruments), and the judge's concluding ruling itself (*hukm* in the narrow sense), all of which were quoted in the terminal judgment record.[83]

---

[78] Baudouin Dupret, Barbara Drieskens and Annelies Moors (eds), *Narratives of Truth in Islamic Law* (IB Tauris 2008), 8 et seq, 12 et seq. For an interesting analysis of the language games of truth formation in courts, see Baudouin Dupret, *Practices of Truth: An Ethnomethodological Inquiry into Arab Contexts* (John Benjamins Publishing 2011), 59 et seq

[79] Ibid, 12

[80] Ibid, 13

[81] Ibid

[82] Brinkley Messick, 'Legal Narratives from Shari'a Courts', in Dupret et al (eds), *Narratives of Truth in Islamic Law*, 52

[83] Ibid, 53

Messick contends that the court makes strategic decisions as to what to include in the official narrative of the records, which is perceived as bearing greater legal significance.[84] However, the records can be very detailed, containing long passages taken from the statements of the parties; Messick believes the reason for this is the wish to present an exhaustive process.[85] Social historians, admonishes Messick, ought to be 'mindful of the dictates and emphases of specific archival cultures, aware of the forms imposed by legal genres and also attentive to the ongoing dialogic developments between opposing narratives in the course of a given trial'.[86] Therefore, 'what is left is the judges ruling, which may identify one of the narratives, or at least a relevant part of it, as being in the right, providing a basis for the ruling'.[87] This again points to the fact that the judge sets the legal truth on which his or her decision is made. As discussed previously, the formation of the legal truth and subsequent collective memories of past violence in TJ processes cannot afford to marginalise survivors. So in order to counter that risk, the bottom-up push for the legal truth may be exercised on the basis of the international paradigm of TJ as well as on the basis of Islamic practice of recording judicial documents and making them accessible.

But what if the courts are inclined to protect the interests of the authorities, and thus skew the legal truths developed throughout the transitional justice process (or indeed mask the blame that international actors should be held responsible for as well)? Can a special administrative court or procedure be set up under Islamic law? Historically, alongside the ordinary judiciary, a new set of tribunals standing at the margins of *shari'ah* courts appeared, known as *mazalim* tribunals (i.e. boards of grievances), for the purpose of 'correcting wrongs committed by state officials'.[88] Hallaq describes these courts as a supplement to the jurisdiction of the ordinary courts, and their jurisdiction was limited and sporadic.

The *Mazalim* (or *Dar al Mazalim*) are described as:

> Courts that served as tribunals of administrative law where the public directly appealed to the ruler or his deputies against the abuse of or failure to exercise power by other authorities, as well as against decisions made by judges.[89]

This type of court is separate from the ordinary court in which the *qadi* judge sits, and is akin to an administrative tribunal. Ido Shahar notes that the *mazalim* courts, operating alongside the *qadi* courts, illustrate a division of legal labour that changed throughout time across the Muslim world.[90] A distinguishing feature of the existence of the *mazalim* courts noted by Mawardi (and reported in Shahar) is the different degree of freedom accorded to the litigant according to the type of claim involved.[91]

---

[84] Ibid, 58

[85] Ibid, 66

[86] Ibid, 67

[87] Ibid, 68

[88] Hallaq, *The Origins and Evolution of Islamic Law*, 99

[89] 'Mazalim Courts' in The Oxford Dictionary of Islam (John L Esposito, ed, Oxford Islamic Studies Online) http://www.oxfordislamicstudies.com/article/opr/t125/e1487 [accessed 14 Dec 2012]

[90] Ido Shahar, 'Legal Pluralism and the Study of Shari'a Courts' (2008) 15 *Islamic Law and Society* 112, 126 et seq

[91] Ali b Muhammad Mawardi, 'Al-Ahkham al-Sultaniyya wa'l-Wilayat al-Diniyya', cited in Ido Shahar, 'Legal Pluralism and the Study of Shari'a Courts', 126 et seq

> In criminal cases involving the "rights of man" (*huquq adami*), plaintiffs are free to choose whether to apply to the *qadi* court or the governor in his capacity as *mazalim* judge. However, cases involving violations of the "rights of God" (*huquq Allah*), which belong to the sphere of public interest, fall under the jurisdiction of the governor (and the not *qadi*).[92]

This suggests that the *mazalim* courts exercised jurisdiction upon claimants' action where their interest had been interfered with, as opposed to the automatic jurisdiction exercised by the ordinary courts involving *huquq Allah* violations (i.e. *hudud* crimes). In particular, the *mazalim* tribunals operated mainly within four spheres:

> (1) They prosecuted injustices committed in the performance of public services, such as unfair or oppressive collection of taxes, or non-payment of salaries by government agencies;
> (2) They dealt with claims against government employees who transgressed the boundaries of their duties and who committed wrongs against the public, such as unlawful appropriation of private property;
> (3) They heard complaints against Shari'a judges that dealt mainly with questions of conduct, including abuses of office and corruption;
> (4) They enforced Shari'a court decisions that the *qadi* was unable to carry out.[93]

The *mazalim* courts, according to Hallaq, were 'sporadic and ephemeral' compared to the established *shari'ah* courts.[94] He reports an Egyptian experience of the ninth century, in which the *mazalim* was established due to a lack of qualified men to serve as *shari'ah* judges and subsequent *shari'ah* courts overturned the *mazalim* decisions. The value of these courts seems to be their added flexibility compared to the ordinary courts, which, however, in today's fair trial and due process standards, may pose a challenge to the human rights considerations of the international TJ paradigm. That said, it may be possible to envisage a *mazalim* court which is both flexible and in line with human rights requirements to serve the interests of TJ in situations where ordinary courts may not have the capacity to adjudicate on cases which exceed the ordinariness of justice and injustice – especially where state officials are concerned. In *mazalim* courts, therefore, the construction of legal truths which reflect the experience of victims of institutionalised abuse may be likelier that in ordinary courts. This in turn would also better inform the narratives that make up historical TJ processes – especially if the findings of the *mazalim* are accompanied by extrajudicial truth-revealing acts. Similarly to the *gacaca* in Rwanda and parallel proceedings in national courts and at the ICTR discussed previously in this thesis, the juxtaposition of legal truths emerging from a variety of proceedings in Islamic law offers a more complete picture of historical violence in context.

The contextualisation of the legal truth shifts the focus of the discussion away from the courtroom and towards other normative and adjudicatory formants of a given Muslim-majority legal system. Just as legal truths can be sought and discovered through avenues other than trials available within the arsenal of TJ mechanisms (most notably truth and reconciliation initiatives), similarly, means of truth-finding in Islamic legal settings are not restricted to trials. The paragraphs that follow will introduce by way of example two

---

[92] Ibid
[93] Hallaq, *The Origins and Evolution of Islamic Law*, 100
[94] Ibid, 101

additional means to extract the legal truth in Islamic law, namely independent scholarly opinions (fatwa) and arbitration (*sulh*).

3.1 Extrajudicial legal truths in Islamic law

Notwithstanding the importance of the work of courtrooms in determining legal truths, extrajudicial mechanisms may also inform historical TJ in Muslim-majority settings. The first example discussed presents itself as a-judicial more than extrajudicial: fatwas, as discussed in chapter 5, are non-binding legal opinions emanating from an established scholar, which may (or may not) be relied upon in the adjudication of a dispute.[95]

Offering an insight into the historical function of fatwas, Amalia Zomeño analyses how fatwas were 'constructed as a legal story', in which the question and the answer to a legal question 'were considered legal precedents and compiled as such, so that the social and legal stories were transformed into pieces of jurisprudence'.[96] She notes how (western) historians have used fatwas to study the Islamic world in the middle ages; however, she recalls Mohamed Fadel's admonishment that 'a fatwa falls somewhere between the ideal and the real', as it constitutes 'the empirical manifestation of his [the mufti's] opinion and it emerges from a unique set of empirical facts'.[97]

Zomeño illustrates how the formulation of the fatwa question – the 'translation of the facts in legal terms' – is 'embedded in a legal frame' – determines the need to understand the interaction between the social and the legal issues at stake.[98] Subsequently, the formulation of the response by the mufti – a legal scholar himself – is imbued with the complex persona of his role which includes the administration of justice, teaching and debating the law, advising the judge in court.[99] The mufti could also be called upon by a judge on a case to provide independent expert answers to legal questions; his (presumed) independence 'reinforced the moral qualification of his function and gave authority to his opinion, since he was outside the political powers that influenced the judges'.[100] Therefore, argues Zomeño, fatwa compilations are meant to last throughout history: after the answer by the mufti is compiled, fatwas went through a process to establish the 'official' version.[101] She concludes by tracing the relationship between the role of the mufti/jurist and history, which is as relevant to the study of the past as it is to recent histories underpinning TJ:

> The only access we have to knowing what really happened in society comes from a text constructed by a jurist. Our access to this record happens only after the mustafi, who is in most cases a judge, makes a selection of the relevant events in the legal sphere. Historians depend on the job of the mustafi, who, in principle, should be objective and provide the mufti with accurate information on the story.[102]

---

[95] See, in general, Wael B Hallaq, 'From Fatwas to Furu': Growth and Change in Islamic Substantive Law' (1994) *Islamic Law and Society*, 1

[96] Amalia Zomeño, 'The Stories in the Fatwas and the Fatwas in History', in Baudouin Dupret, Barbara Drieskens and Annelies Moors (eds), *Narratives of Truth in Islamic Law* 25, 25 et seq

[97] Ibid, citing Mohamed Fadel, 'Fatwas and social history' (1996) 8(2) *al-'Usur al-Wusta* 32-4

[98] Zomeño, 'The Stories in the Fatwas', 32.

[99] Ibid

[100] Ibid, 39

[101] Ibid, 47

[102] Ibid

Although one could be more sceptical as to the primacy and infallibility of jurists (both inside and outside of the courtroom) as described in the quotation, with reference to historical TJ efforts it would seem that the role of the mufti as a qualified, institutional recipient of factual complaints, is well-placed for developing a version of the truth which feeds into the legal truth.

The second example of extrajudicial processes uncovering the legal truth is found in the *sulh* mechanism, reflecting the private nature of justice in Islamic law (discussed in the first part of this chapter with reference to criminal law and *qisas*). *Sulh*, roughly translated as 'amicable settlement', constitutes an alternative dispute settlement mechanism under Islamic law 'grounded upon compromise negotiated by the disputants themselves or with the help of a third party'.[103] As an alternative to trials, it encompasses the concepts of 'conciliation' and 'peacemaking',[104] resonating with transitional aims. In conjunction to trials, *sulh* provides the procedural option to 'defer disputants to mediation before trying their case or at any stage of trial'.[105]

Although the primary aim of *sulh* is reconciliation between parties, it also results in the discovery and crystallisation of a narrative in order for the dispute to be solved; this truth is provided by the parties and accepted by the adjudicator. Indeed, just like in proceedings before a judge, the 'third party' of *sulh* must be satisfied with a narrative based on accepted evidence in order to construct a legal truth and adjudicate between parties. Aida Othman argues that under Islamic law 'the trial process is not regarded as an ultimate truth-finding mechanism that will lead to substantive justice'.[106] Therefore, even the outcome of a *suhl* settlement can offer a reading of facts that synthesises the parties' competing narratives, demands and positions as accepted by the adjudicator – resulting in the formation of legal truth.

The scope of potential applications of *sulh* extends to 'conflicts between members of society' when this 'is in the public's interest (*al-maslahah al-mursala*h)'.[107] It appears in medieval and modern penal codes.[108] Today, *sulh* is notably used in commercial arbitration.[109] Indeed, on the basis of Qur'anic exegesis, it has been argued that the doctrine of '*sulh* is best' is valid 'in all instances of discord, even those conflicts triggered by homicide' (i.e the most serious).[110] This position was held historically by the Hanafi school of Islamic law, in contrast to the more restrictive Shafiis,[111] revealing:

---

[103] For an historical overview of amicable settlements as an alternative to trial in the Islamic tradition, see Aida Othman, '"And Amicable Settlement is Best": Sulh and Dispute resolution in Islamic Law' (2007) 21 *Arab Law Quarterly* 64, 65 et seq, 68

[104] Aseel Al-Ramahi, '*Sulh*: A Crucial Part of Islamic Arbitration', (2008) LSE Law, Society and Economy Working Papers 12/2008 http://ssrn.com/abstract=1153659 [accessed 10 December 2012]

[105] Othman, 'And Amicable Settlement is Best', 65

[106] Ibid, 69 citing Q 4:128: 'If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement (*sulh*) is best. And Q 4:35: If ye fear a breach between them [the spouses], appoint (two) arbiters, one from his family and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things'

[107] Ibid and Essam A Alsheikh, 'Distinction between the Concepts Mediation, Conciliation, Sulh and Arbitration in Shari'ah Law' (2011) 25 *Arab Law Quarterly* 367, 369, and fn 8 citing Q3:35: 'And if you fear a breach between the two [spouses], then appoint a judge from his people and a judge from her people; if they both desire agreement, Allah will effect harmony between them, surely Allah is knowing, aware'

[108] Othman, 'And Amicable Settlement is Best', 72, citing the Dulkadir in Anatolia and the Ottoman Mejelle (1885)

[109] Al-Ramahi, '*Sulh*: A Crucial Part of Islamic Arbitration'

[110] Othman, 'And Amicable Settlement is Best', 69.

[111] Ibid, 83, 85

> A collision of two sets of ethical and religious ideals: that of forgiveness and setting aside the misunderstanding and mistakes of another in favour of reconciliation; and that of ensuring the lawfulness of gain as well as preventing unjust enrichment of an untruthful party.[112]

The favour afforded to *sulh* in the Islamic legal tradition is based on the Qur'anic encouragement to solve disputes amicably,[113] preferring forgiveness and reconciliation:

> The recompense for an injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation, his reward is due from Allah, for (Allah) loveth not those who do wrong.[114]

Further confirmation of this preference is found in the *hadith.* A tradition attributed to the caliph Umar corroborates the view that adjudication without an amicable settlement leads to bitterness.[115] Othman recalls that 'the Prophet was said to have encouraged compromise and to have mediated both public disputes, such as those between fighting clan members, and private ones, including those between his Companions and their creditors'.[116] This is especially interesting for the purposes of TJ, as it confirms the flexibility of the *sulh* method of dispute settlement both for private and for public affairs. Similarly to the *gacaca* in Rwanda and other forms of local, informal dispute-settlement discussed previously in this thesis, *sulh* allows for a greater degree of openness than ordinary court proceedings, partly freeing the parties from the constraints of established procedural norms; consequently, a greater range of truths can be uncovered.

On the basis of this description, the possibilities of favouring (and achieving) reconciliation and forgiveness through *sulh* could be used to trump the retribution carried in the *qisas* penalties discussed earlier. More in general, as a core aim of TJ, reconciliation through a recognised process can also contribute to accountability and justice – and thus be instrumental in uncovering the legal truth about past abuse, as discussed in chapter 2. Provided basic rights guarantees are met and ensuring justice does not become solely a private affair, *sulh* may participate in uncovering the truth about past violence and in giving formal recognition to the accounts emanating from a recognised process. Though the resulting legal truth is unable to offer a comprehensive and neutral account of history for the same reasons discussed with regards to the legal truth in chapter 2, among which are the restrictions imposed by an *inter partes* dispute, it nevertheless is able to contribute to historical TJ. Firstly, much like trials, *sulh* uncovers truths as part of a legal ritual, setting down a historical record about past abuse and legitimising its discovery in official/legal language. Secondly, its findings provide a synthesis of competing narratives mediated by a third party in painting an inherently nuanced (and conflicted) version of the past.

The resulting legal truth depends heavily on the actors that shape the *sulh* process – as an example of a truth-seeking initiative. Thus, unless the resulting truths are able to be challenged again, they may enable (or perpetuate) social violence. If truths uncovered through *sulh* are given public effect through archiving or

---

[112] Ibid, 86

[113] Al-Ramahi, '*Sulh*: A Crucial Part of Islamic Arbitration', 12

[114] 42:40 cited in Othman, 'And Amicable Settlement is Best'

[115] Ibid 69, citing Raddū-l-khusūm hattā yastalahū, fa-inna-l-qadā yūrith al-daghāʾin', 8 (15304): 303-4; Ibn Abī Shayba, al-Musannaf 7 (2938): 213-14: 'Dispel the disputants until they settle amicably with one another (yastalatu); for truly adjudication leads to rancour'

[116] Ibid

publication, they can help reconstruct and challenge historical accounts. Moreover, by linking them into the formal judicial system and providing parties with a joint procedural right to access *sulh*, victims may be able to activate this process to uncover truth and apportion responsibilities about past abuse without the negative effects of judicial sentencing. In this light, *sulh* could operate analogically to truth commissions, which have already been experimented in Muslim-majority contexts.[117] This reflects the options potentially available to policy-makers today in designing TJ initiatives to uncover the truth which also resonate with Islamic law practices, including the extrajudicial means of *sulh*. The ethical considerations that may affect the formation process and validity of the legal truth are critical to understand the following paragraphs.

3.2 Ethics and legal truths in Islamic law

The preceding discussion hints at the tension between legal truth and historical/factual truth in the Islamic legal tradition, also reflected in TJ. The dichotomy between legal truth and historical/factual truth in Islam reflects the gap between legal validity based on judicial-procedural formality, and the ethical dimension of reality, which in the Islamic tradition constitutes the cornerstone of religious obligations towards God. Some of the challenges of truth-finding (and more broadly adjudication) through trial and other formal mechanisms are summarised in the following *hadith*:

> You bring me lawsuits to decide, and perhaps one of you is more skilled in presenting his plea than the other and so I judge in his favour according to what I hear. He to whom I give in judgment something that is his brother's right, let him not take it, for I but give him a piece of the Fire.[118]

The legal truth conceals these inequalities and thus risks reasserting unequal social structures in the course of trials and other truth-seeking initiatives, rendering the truth uncovered in secular or Islamic processes equivalent. Under Islamic law, a *qadi*'s decision based on incorrect facts is problematic, as 'the execution of the title or the obligation is licit only if the judgment concurs with the truth of the facts', because 'even if the qadi ignores this truth the parties' memory preserves it'.[119]

Baber Johansen has analysed the different positions of classical jurists on 'legally and procedurally impeccable judgment[s] which [are] blatantly wrong in [their]appreciation of the facts'.[120] In the Hanafi and Hanbali traditions there seems to be a confirmation of 'the notion of the sacred character of the judiciary's verdict: the judge's decision is God's norm as revealed by his deputy and the believers have to abide by it'.[121] Nonetheless, on the basis of Qur'anic provisions and *hadith*, later Hanafi scholars objected to the doctrine of the 'ethically binding character of the judge's verdict which is based on error in fact', upholding the

---

[117] Moroccan Equity and Reconciliation Commission (ERC). See inter alia: Luke Wilcox, 'Reshaping Civil Society through a Truth Commission: Human Rights in Morocco's Process of Political Reform' (2009) 3(1) *IJTJ* 49, 58; and Bettina Dennerlein, 'Remembering violence, negotiating change: The Moroccan Equity and Reconciliation Commission and the Politics of Gender' (2012) 8(1) *Journal of Middle East Women's Studies* 10, 13

[118] Mālik ibn Anas (d. 179/795), al-Muwattāʾ (Beirut: Dār al-Gharb al-Islāmī, 1996), vol. 2 under Kitāb al-Aqḍiya [Book of Judgments] (2103), cited in Othman, 'And Amicable Settlement is Best', 69

[119] Baber Johansen, 'Truth and validity of the Qadi's judgment. A legal debate among Muslim Sunnite jurists from the 9th to the 13th centuries' (1997) 14 *Recht van de Islam* 1, 18

[120] Ibid, 9

[121] Ibid, 12 et seq

'believer's ethical and religious duty to behave according to his knowledge of the truth of the facts'.[122] As such, an important distinction is introduced between internal and external forums, i.e conscience and expression, of knowledge of factual truths, providing a new ethical perspective on how legal truth can be understood in Islamic legal settings. According to Johansen:

> In the relation 'between the individual and God' the 'forum internum' is governed by the knowledge which the parties have of the truth of the facts. Only in referring to his or her knowledge of the facts can the individual person define his or her responsibilities before God. If the judge's decision does not correspond to the truth of the facts it cannot, before the forum internum, determine the individual's ethical responsibility.[123]

For the Shafii doctrine (and Maliki[124]), there is no dividing line between legal and ethical validity, and an erroneous judgment 'may even loose its legal validity in face of ethical opposition', as the *forum internum* rules over over the *forum externum*.[125] Thus, the *qadi* must 'do justice to both dimensions, the legal and the ethical one'.[126] This approach consolidates the religious significance of the truth, which may influence the formation of the legal truth and its subsequent uses.

In general, Johansen demonstrates that the vast majority of Sunni scholars concur in that the 'qadi's judgment constitutes a legal title, the confirmation of a legal claim'.[127] However, the parties to a case must act according to 'ethical considerations', as 'it is his or her religious duty to act according to the truth of the facts', based on the significance of *forum internum* religious considerations that guide Muslims:

> The truth of the facts as preserved by the parties' memory is recognized by the jurists as the decisive criterion of the forum internum for the legitimacy of the verdict's implementation by the parties. It is on the level of its implementation by the parties that the qadi's judgment remains related to and dependent upon the truth of the facts. Before the forum internum the qadi's decision is valid only if it is based on true assumptions as far as the facts of the case are concerned.[128]

Thus, 'legal and the ethical dimension of religious normativity have to co-exist' for Islamic law.[129] Relatedly, Johansen presents the distinction between 'the authority of the judicial verdict which is based on correct procedure and independent legal reasoning' and 'the truth of the facts which remain hidden to the qadi'.[130] As such, uncovering the legal truth is a question of procedure, whereas revealing the factual truth is one of ethics in the context of Islamic law; however intimate, their relationship remains conflictual.

Taking stock of this analysis, two main points can be drawn with regards to the relationship between legal and factual truth in Islamic law: (1) *how to find the truth* – there is no obligation to derive the truth (both

---

[122] *Ibid* referencing Abu Yusuf and ash-Shaybani; and Q 2:188: 'And do not consume one another's wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful]'

[123] Ibid

[124] Ibid, 17

[125] Ibid, 15

[126] Ibid, 16

[127] Ibid, 18 et seq

[128] Ibid

[129] Ibid

[130] Ibid, 19

legal and factual) only through a *qadi*-led trial. And (2) *why to find the truth* – on the basis of the ethics that underpin the distinction between *forum internum* and *forum externum*, factual truth is valued more highly than the legal truth, which may lead to a more flexible approach to uncovering the truth about past abuse as long as the requirements of IHRL are met.

Firstly, as noted above, there is no trace of naivety among the early jurists of all the four main Sunni schools with regards to the conceptual and practical distinction between legal truth and factual truth and its implications in terms of workability of the legal system. There is an understanding that the legal system must – to a reasonable degree – operate regardless of the inherent and insurmountable fracture between legal and factual reality, even in cases where the former does not match the latter. The early Sunni approaches reported by Johansen illustrate the initial ambiguity in relation to which type of truth to follow; however, eventually the Sunni tradition elevated the ethical dimension of factual truth above the simple legal truth as derived through established judicial procedure. This suggests that there is no overarching obligation under Islamic law to override factual truth with procedurally-sound legal truth. Similarly to secular law (such as international law that underpins TJ), the legal truth uncovered through Islamic law instruments is subject to the same risks of domination of the prevailing narrative by the elites and those in positions of relative power vis-à-vis victims in trials and truth commissions. Thus, Islamic law is not only comparable to secular and international law for its benefits, but also for its shortfalls.

In the context of TJ in Muslim-majority legal systems, there are no strict obligations to establish the truth through trials alone, especially if courts were unable to deliver legal truths which matched factual (and ethically sound) truths. As such, transitional truth-seeking mechanisms can, in light of the Islamic legal tradition, depart from ordinary, *qadi*-led justice in uncovering legal truths more closely linked to factual truth. This confirms that truth commissions and other non-judicial enquiries do not contravene Islamic law; instead, the existing practices of fatwas and *sulh* may inform their design and implementation.

Secondly, the preceding discussion revealed the ties between the *forum externum* and the *forum internum* of those involved in the proceedings. Given that there is no obligation for the *qadi* to coerce the parties or anyone else into revealing factual elements to construct his final legal truth, it must follow that the factual/ ethical truth may also be derived outside the courtroom. In other words, if the *forum externum* as driven by the *qadi* delivers an unsatisfactory form of factual truth then transposed into legal truth, the *forum internum* of the individual's ethical and religious dimension may still be able to act on the basis of the factual truth – which could include the participation in other truth-seeking initiatives. For TJ, this means that if a trial proves to be inadequate in finding the truth, this will not constitute a barrier to individual (and collective) endeavours to seek the truth through alternative mechanisms – such as a truth commission.

The value of finding the truth and dealing with it internally might hold a special religious significance which also contributes to the formation of the legal truth for the purposes of TJ. For instance, there may be compelling reasons to establish truth-finding mechanisms that better suit the needs of the *forum internum* as mandated by religious imperatives, which may also include truth commissions and other similar mechanisms of enquiry. On the basis of Qur'anic injunctions, there may be further incentives for believers to participate in (and promote) truth-seeking initiatives by establishing religious rewards:

> O you who believe! Be maintainers of justice, bearers of witness for God's sake, even if though it be against your own selves, you parents, or your near relatives, and whether it be against [the] rich or [the] poor.
> O you who believe! Be upright to God, bearers of witness with justice.[131]

The special relationship between truth and ethics in Islamic law provides additional arguments to pursue the truth as part of historical TJ processes in Muslim-majority settings. Giving truth-seeking initiatives a religious justification might, furthermore, increase the local ownership of TJ by drawing on the language of local norms and customs. Although, in practice, political considerations and the personal interests of those who dominate the transitional processes may override religious principles, the ethical underpinnings of the truth may help guide the process and even develop a discourse about the right to the truth in Islamic law.

The combination of the elements discussed in relation to formation of the legal truth in Islamic settings highlights the possibility of uncovering the legal truth through a variety of means and with the participation of many stakeholders of the legal system. Just like secular international TJ truth-seeking initiatives, variations drawing on the Islamic tradition encompass both trials as well as non-judicial mechanisms. With regards to trial-based truth-seeking, the preservation and further use of official documentary records in courts indicates a broad effect of the legal truths uncovered in litigations between (private and public) parties, which contributes to the formation of historical TJ. Extrajudicial means to uncover truths include fatwas (scholarly opinion in relation to a set of facts) and *sulh*, Islamic law's own alternative dispute mechanism, that both contribute to the formation of legal truths and thus to historical TJ. Moreover, these mechanisms can provide some justification within the Islamic legal tradition and practice for non-judicial truth-seeking mechanisms, such as truth commissions and inquiries.

[131] Q 4:135 and Q 5:8 cited in Baderin, *International Human Rights and Islamic Law*, 99

4. Time to look for a right to the truth under Islamic law?

Chapter 3 made a case for the existence of the right to the truth under CIL and as an emerging general principle of international law. To consolidate this claim, it concluded that there should be a widespread acceptance of the right to the truth across jurisdictions and legal systems – domestic, regional and international. As such, Islamic law may also contribute to the consolidation of the right to the truth as a general principle of law, alongside civil and common law (among others).[132]

On the basis of the earlier discussion of the influence of the ECHR and Inter-American jurisprudence on the global establishment of the right to the truth, it is important to stress that its further consolidation relies on the identification of comparable references in other jurisdictions and legal traditions, to ensure a greater inclusivity of different perspectives. With regards to the right to the truth in Islamic law, to date there is no specific literature on the topic in the English language, making this enquiry particularly challenging. For this reason, this author is unable to outline clearly what the right to the truth may look like in Islamic law; future research based on exegesis of the (Arabic) main sources of *shari'ah* in that regard – which falls beyond the scope of this thesis – will hopefully fill this gap.

Mindful of how a *shari'ah*-derived right to the truth in Islamic settings may complement the global consolidation of this key aspect of TJ, three key considerations set the scene for further enquiry by scholars of Islamic law.

(I) Reaching the (Islamic) right to the truth through ICL (and not IHRL)

A victim's individual right to the truth for abuse suffered at the hands of public officials or third parties (where the authorities failed to protect or investigate) could be brought within the scope of Islamic criminal law – and, specifically, under the category of *qisas*. Based on the centrality of criminal law and the relative marginalisation of human rights in Islamic legal systems, employing the penal category of *qisas* and the victim's right to compensation may yield more fruitful results than attempts to use human rights language to promote the right to the truth in Islamic law. In particular, as discussed previously, the victim's right to compensation under *qisas* empowers not only the direct victim, but also his or her family, in the determination and application of the penalty to the perpetrator. Notably, discretion leaves room for leniency and forgiveness (prized in Islamic law) and can avoid corporal punishments. This approach would enable the offended parties to request, instead of the application of corporal punishments or blood money (*diyya*), an account of the truth about the incident and situation through an ordinary trial, or through one of the extrajudicial means permitted in the Islamic legal system which contribute to the aims of TJ (also discussed previously in this chapter).

The perpetrator's participation in truth-seeking mechanisms could be seen as a substitute for the traditional penalties. In this context, the human rights abiding state authorities leading TJ processes could provide an appropriate institutional and legislative framework for the implementation of the right to the truth through trials, truth commissions and other means. In light of the IHRL guarantees that can be voluntarily embedded into this approach by the state, this model may creatively allow for the victims and their next of kin to request trials, truth commissions and other forms of truth-seeking connected to their individual suffering

[132] Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the ICC', 412, citing Article 21(1)(c) of the Rome Statute

which will at the same time contribute to uncovering the truth in the context of historical TJ. Therefore, the right to the truth for victims can be constructed as part of criminal proceedings through *qisas* in cases that involve offences agains the person. For crimes falling within the scope of *tazir*, instead, the discretion afforded to lawmakers in determining penalties and procedures poses no apparent challenge to including provisions for the right to the truth as part of the proceedings.

(II) Making strategic use of the principle of maslahah

In TJ settings, the right to the truth bears significance at societal level – identified in chapter 3 of this thesis as an additional layer to the right to the truth that goes beyond the direct victim of abuse. Collective benefit is an important part of Islamic legal systems, discussed in chapter 4 of this thesis: drawing from Kamali, *maslahah* – public benefit and common good – can be understood as 'the summa' of the objectives of Islamic law.[133] In light of this, the right to the truth in TJ contexts could be arguably situated within the scope of *maslahah*, given its importance both for direct victims and their families as well as for society as a whole in achieving the end goals of truth, accountability and reconciliation. Accordingly, TJ policies that acknowledge and are responsive to the right to the truth may find support through the principle of *maslahah.* This paves the way for further commitment to truth-seeking mechanisms allowing victims to exercise their right to the truth and the rest of society to find out about past abuse through public inquiries and other mechanisms.

The challenge posed by this approach, however, falls within the political sphere: although the principle of *maslahah* is recognised as a central feature of Islamic law and as such informs the implementation of TJ in Muslim-majority settings, there is no common understanding of what constitutes public benefit or common good in a society. Instead, that standard is determined politically according to historical and geographical contexts by actors with agency to decide as part of a democratic process or as an expression of new authoritarianism. The latter instance risks reproducing old patterns of marginalisation and social violence in deciding what social values ought to be and whose voices may be heard. For example, a post-transitional elite may decide that the silencing of the previous regime and preventing them from accessing truth-seeking mechanisms falls within the scope of the common good for society – TJ processes will be designed accordingly, and the truths uncovered are likely to be partial or misleading. The law-based solution to this challenge may be found in the dialogue between the international framework of TJ that underpins the pursuit of legal truths and equivalent principles and practices of Islamic law that resonate with local understandings of justice. Nonetheless, political backing remains crucial for this approach to be successful.

(III) Gaining support from authoritative scholarly voices

Finally, authoritative voices can help radically revisit the understanding of Islamic law to suit contemporary TJ needs, as demonstrated by the opinion of Al-Azhar scholars in revising the (*hudud*) crime of *baghi* in the recent Arab uprisings. If the right to the truth is brought to the fore of the debate and supported by said authorities, there may be additional encouragement to embed this right in the TJ processes underway in Muslim-majority settings. This would enable the establishment of appropriate judicial and extrajudicial mechanisms to respond to the victims' right to the truth and society's need to know about past violence.

---

[133] MH Kamali, '*Maqasid al-Shari'ah*: the Objectives of Islamic Law' (1999) 38(2) *Islamic Studies*, 193

The problem with that, however, is the connection between scholars, the old regime and the new one. Certain actors may cloak political interests in transitional contexts with seemingly theoretical arguments presented as seemingly neutral. With reference to the right to the truth, arguments to limit the scope of enquiry by excluding certain forms of violence and victimhood from scrutiny may in fact limit TJ. This places scholars in an ambivalent position in TJ depending on what their recommendations are and how they influence policy. Thus, the influence of scholarly voices should be understood primarily as political and not as doctrinal (or religious).

The outlined three-way approach to developing the right to the truth in Islamic legal settings and then feeding them into the international paradigm of TJ still faces the hurdle of cultural relativism and related arguments, both among international lawyers and proponents of Islamic law, who may dismiss this attempt as unorthodox, unnecessary or unattainable. The political context is also key to understanding the extent to which stakeholders explore synergies. In TJ, these concerns may be rebutted thanks to the distinctive flexibility of the applicable legal framework which, as discussed earlier, demonstrates the workability of competing norms in a context of legal pluralism.

At this point it is important to note that if, in its origins, PIL had been more explicitly designed to be receptive to laws other than those of some powerful nations in the West, this issue would not be so apparent today. And consequently, the international paradigm of TJ would be more readily applicable to local settings, including Muslim-majority contexts. By engaging its internal potential for legal pluralism in TJ, PIL may move beyond being 'international' (i.e. focusing on the official laws and interests of states) and become more truly global and look at a broader range of norms and actors, which is already happening in relation to human rights. The legal framework of TJ may provide an opportunity to propel this process of normative inclusivity, which in turn will feed into general PIL.

The inherent adaptability of PIL by virtue of its nature and subject-matter is apparent in previous TJ experiences that have provided opportunities for redirecting international law at key moments in history. But the tendency to impose forms of victors' justice in transitional contexts has enabled specific narratives to be exalted over others, and preserved only certain accounts through trials.[134] Any discussion of TJ today should be mindful of the possible manipulations of historical accounts to annihilate the memory of certain groups of victims and survivors. For this reason, the relocation of TJ from international law to Muslim-majority legal systems is useful if it helps uncover the truth about past abuse suffered by all victims and survivors, consolidating and adding to the achievements of PIL. Thus, if a norm of Islamic law helps further the aims of transition in Muslim-majority settings, the principles upheld are capable of informing the evolution of the global paradigm of TJ. The transitional theme of legal truths to build collective memories provides an example of how Islamic law and practice could advance this element in the global TJ paradigm.

[134] A notable example of this is found in the Nuremberg trials, which focused on the horrors of the holocaust while ignoring any Allied responsibility, including for the mass rape of the women of liberated Berlin by Russian troops. See historian Antony Beevor, *The Fall of Berlin* (Penguin, 2003) and survivor Gabriele Köpp, *Warum war ich bloß ein Mädchen? Das Trauma einer Flucht 1945 (Why did I have to be a girl?)* (Herbig, 2010)

5. Conclusions

This chapter discusses the localisation of some of the core aspects of the international paradigm of TJ in Muslim-majority legal systems – especially the notion of legal truth and the emerging right to the truth. It focuses on the potential of Islamic law and practice compared to TJ concepts based on PIL, but also how it may contribute to an emerging global paradigm of TJ that looks beyond official state laws. A critical and constructive approach to the tensions between Islamic law and the PIL standards of TJ can ensure the two sets of norms complement and support each other in pursuing transitional aims in a pluralistic legal system. This analysis provides new ways of thinking creatively about the overlap between the norms of *shari'ah* and TJ to consolidate the legal framework for channelling transitions in Muslim-majority legal systems.

By ensuring that the relocation of TJ into Muslim-majority legal systems meets IHRL standards, it is possible to explore and develop strategies for converging the Islamic law and the international paradigm of TJ. As IHRL is now the main source and overarching requirement of TJ, establishing the general compatibility between human rights and Islamic law is essential. To enable this comparison in the absence of a discrete body of human rights law in the Islamic legal tradition, the analysis uses criminal justice, which is sufficiently developed in Islamic law and fully embedded in human rights themes. Thus, when a given substantive or procedural principle of IHRL/ICL applicable to TJ finds an Islamic equivalent, Muslim-majority legal systems are able to accommodate TJ based on international law. With particular reference to the truth-seeking focus of TJ which contributes to the formation of collective memories of past abuse, Islamic law offers a variety of trial-based and extrajudicial mechanisms to uncover and record legal truths. The peculiarity of the relationship between Islamic law and the legal truth can be identified in the ethical considerations that provide religious backing to truth seeking activities. Consequently, both international and Islamic arguments can be adopted in implementing transitional truth-seeking activities.

Building on those findings, there seems to be no immediate barrier to exploring the right to the truth in relation to Muslim-majority legal systems. It is significant that jurisprudence and practice drawn from *shari'ah* affirm the importance of uncovering factual accounts in judicial and extrajudicial proceedings and record them in formal legal language; this contributes to the recognition of legal truths in Muslim-majority legal systems, which are relevant to both non-transitional and transitional contexts. This recognition of the truth paves the way for enquiring into the right-bearers of the truth: future research will help clarify the possibility of an equivalent victim's right to the truth in Islamic law. That would feed directly into the consolidation of the right to the truth in the global paradigm of TJ as well as offering a useful tool for the design of transitional processes in Muslim-majority settings actionable by survivors. As such, Islamic law may feed into the discussion around the right to the truth under international law.

This analysis leads to the conclusion that it is possible to purposely interpret the relocation of TJ from the international paradigm based on PIL to Muslim-majority legal systems – taken as a specific example of a local setting. Indeed, comparative methods enable a deeper engagement of Islamic law as a formant of Muslim-majority legal systems alongside PIL, thus both sets of norms guide the design and implementation of TJ processes in those contexts. As such, the framework of reference for TJ in Muslim-majority legal systems is incomplete without looking at the unofficial (i.e. non-state) norms set out by Islamic law, jurisprudence and practice, which influence the way a community facing transition conceptualises the aims

of accountability, justice and reconciliation. By exploring the compatibility of international standards that underpin TJ and the Islamic law equivalents, this thesis finds that there are sufficient substantive and procedural overlaps between the two to support a more strategic use of *shari'ah* to further transitional aims. The variety of mechanisms in Islamic law, jurisprudence and practice suggests that its creative engagement could strengthen and facilitate TJ in Muslim-majority legal systems.

The overall research question also investigates the contribution of norms emerging from local settings – in this case, Muslim-majority legal systems – to the global paradigm of TJ, which does not restrict itself to the formal laws of states. In particular, the formation of collective memories about past violence, legal truths and the related right to the truth are taken here as the cornerstones of the international paradigm of TJ; this thesis argues that the unofficial norms of Islamic law may help consolidate those concepts globally. In fact, more broadly, the Islamic law contribution to the global paradigm of TJ feeds into the idea of a *jus commune/jus gentium* of TJ which no longer relies on state law and is more responsive of informal norms. This shift helps TJ overcome the challenges of the universality debate: if its global paradigm is understood as inherently (and incrementally) pluralistic, then TJ relocation to specific settings is necessarily less strained, because it can draw from its own contextual unofficial norms as well as leaving a legacy of those principles within an ever-evolving framework of reference. While further theoretical research will refine these claims, the ultimate proof of validity of such propositions will become apparent in the TJ processes designed and implemented in Muslim-majority legal settings, such as the countries facing legacies of violence after the Arab Uprisings.

Conclusions

Analysing the relocation of transitional justice from the international paradigm to Muslim-majority legal systems demonstrates that the two sets of norms are not as distant as one may expect. The substantive and procedural rules of IHRL and ICL that define TJ generally have an equivalent in Islamic law; when this is not apparent, *shari'ah* is still flexible enough to provide a normative justification for the transitional aims of accountability, justice and reconciliation on the basis of the principle of public benefit (*maslahah*). In principle the jurisprudence and practice of Islamic law also offer support to the emerging global paradigm of TJ – which has already been enriched by transitional experiences across different societies. More specifically, the importance afforded to truth-seeking and the legal truth in Islamic law strengthens the right to the truth and the concept of collective memory in the framework of reference for TJ.

This thesis contributes to understanding the localisation of transitional justice by looking at the roles played by coexisting local and international norms. Partly overcoming the feared relativism-universality deadlock, the characteristic legal pluralism of TJ reveals how competing sets of norms overlap as formants of any legal system, seen from a comparative law perspective. As such, international law applies alongside forms of local justice and may even draw on them to boost its own legitimacy; at the same time, local rules and practices of specific contexts – such as Islamic law in Muslim-majority settings – inform the uses of international law. Together, they feed into the development of a global paradigm of transitional justice which is increasingly sensitive to bottom-up normative influences in addition to those introduced top-down.

Considering the dialogical relationship between international and local rules of transitional justice, this thesis argues that the two sets of norms cross-fertilise in practice as well as conceptually, departing from the belief that the influence is uni-directional and that it is local justice which responds to PIL but not vice versa. The discussion of Muslim-majority legal systems provides an example of how these propositions may operate in a given setting, adding a new perspective to the study of transitional justice in the Arab Uprisings. In addition to informing our thinking about TJ in the MENA region and other Islamic contexts, the implications of this research add to the broader question of localising transitional justice to any given specific setting. For these reasons, scholars and practitioners in law as well as non-lawyers involved in the analysis, design, implementation and evaluation of specific applications of transitional justice are likely to find this research useful.

The rules applicable to TJ are unique to each setting and, for the most part, defined by the key stakeholders of the process whose interests and position affect the rules for pursuing accountability, justice and reconciliation after a history of violence. The risk of dominant actors marginalising survivors' voices has been partly addressed in international law through the emergence of a victim's right to the truth in the context of TJ. In parallel, local justice, such as Islamic law, also provides tools for empowering survivors through truth-seeking and other mechanisms. The combination of international and local approaches that give victims a greater role feeds into the development of a global *jus commune/jus gentium* of transitional justice.

Towards a Global Paradigm of Transitional Justice where International and Local Norms Meet

This thesis offers a conceptual framework to interpret the relocation of TJ from international law to local settings, such as Muslim-majority legal systems. The research question inquires into whether it is possible for the development of a global law of transitional justice to draw from the local norms that support from the bottom-up what PIL defines from the top-down. This analysis avoids simply viewing the relationship either as a one-way vertical imposition of international law over other legal systems, or as a context-specific explanation of how local law could complement from the bottom-up the framework that PIL determines from the top-down. Instead, it captures the complexity of combining international and local norms in TJ processes from a comparative law angle, critically reassessing the range of applicable laws.

The findings indicate that the relocation of transitional justice from international law to a specific context, such as Muslim-majority legal systems, occurs in the context of legal pluralism in which key stakeholders in the process determine the applicable normative framework. As such, the localisation of TJ is not simply based on the inherent prevalence of local forms of justice or of international law, but rather on their combination. For these reasons, international and local laws are theoretically equal in normative terms within the framework of TJ; their applications, however, differ according to the politics of a given setting. Thus, local justice is not only relevant to specific settings, but also has the potential to acquire significance in the emerging global paradigm of transitional justice.

After setting out the framework of reference for transitional justice, the first chapter considered international and local norms alongside each other as coexisting sources, where the latter also carry the vital effect of facilitating cultural ownership of the initiatives and conceptions of justice by the beneficiary community, when the language and operation of international law seems distant from the local understanding of rules and values. The second chapter then looked at the notion, functions and limitations of the legal truth as part of collective memories in transitional justice, focusing on how it is moulded and even distorted away from factual/historical truth by dominant actors in the truth-seeking process - often to the detriment of victims and survivors of abuse. To counter the marginalisation of victims' voices in uncovering the truth about the past, the emerging right to the truth was discussed in chapter three as a new tool to counter dominant narratives of historical violence that ignore survivors' accounts; the gradual affirmation of the right to the truth, while not limited to transitional justice settings, is apparent in international law (and in particular human rights) as the result of the comparative appraisal of its existence in global as well as regional settings. Chapter four argued that the under-utilised methods of comparative law can help understand the law of transitional justice both in its local applications as well as in its global delineation. The last two chapters concluded that Muslim-majority legal systems are capable of receiving TJ based on PIL; and most significantly, principles and practices of Islamic law also add to the formation of global rules of TJ, including in relation to truth-seeking.

Taking Transitional Justice to Muslim-majority Legal Systems - And Finding Something to bring back to International Law

With reference to localising TJ in Muslim-majority contexts, by stripping the *shari'ah* of its divine nature and focusing on its secular normative effects in the regulation of society, it can be appreciated on a par with other legal formants of a system, such as relevant international law, domestic law, case law and the opinions of jurists. This enables a discussion of the possible creative uses of Islamic law in applying TJ in Muslim-majority legal settings, as well as the contributions it could make to the global rules of transition. As such, the findings reveal that transitional justice is generally capable of being relocated from international law to specific settings, which in turn feed into the development of a jus commune/jus gentium of transitional justice drawing on multiple traditions. In that regard, the methods of comparative law seem to help understand the legal formants of a given system, viewing the social functions of norms in the context of transition, instead of a hierarchy of clearly-defined formal sources.

These findings renew our understanding of how transitional justice is and can be localised from PIL to specific settings in two main ways: firstly, by evaluating the compatibility between international and local rules, it suggests that they are normatively equal in a given legal system; secondly, it postulates that local law and practice contribute to the emerging global paradigm of transitional justice. The originality of this thesis lies in the reassessment of the relativism v universality debate in relation to transitional justice from the perspective of comparative law, a proposition then tentatively tested in relation to Muslim-majority legal systems. This particular context was chosen because, on the one hand, it addresses contemporary scenarios for transitional justice emerging in the wake of the Arab Uprisings, and on the other, because of the ongoing disputes around Islam and human rights. This thesis proposes a new reading of the tensions between local and international norms applicable to transitional justice, demonstrating that the former actually contribute to the latter, with the pivotal effect of reducing the pervasiveness of the universality question. The ideas explored here also lend themselves to other legal systems influenced by faith, socially-normative philosophies (like Confucianism) and ideologies.

In light of this work, transitional justice reveals its local and global features as complimentary not only in practical applications but also in theory. As such, the emerging *jus gentium/jus commune* of TJ is enriched by both sets of norms as well as by the outcomes of their interplay. Therefore, the tensions between local and international conceptions of justice applicable to transitions, though not disappearing altogether, seem to be defused in this area of law. The discussion around relocating international understandings of TJ in Muslim-majority legal systems provides an example of how Islamic law does not pose unsurmountable obstacles to its implementation, and instead may be used creatively to channel international standards through local legal culture. But the general argument of this thesis goes one step further: if a local legal system which relies heavily on unofficial norms has the potential to adapt the international paradigm of TJ to its own specific setting successfully and effectively, it may also contribute to the way of thinking about TJ globally. So, just as the innovative truth-seeking mechanisms of contexts as disparate as Latin America, Rwanda and former Soviet countries have redefined the framework of reference for TJ and countered the dominance of the Nuremberg model inherited by the ICC, likewise, even original experiences in transitioning Muslim-majority societies (and many others) can feed into the ongoing debate.

Bibliography

A

Abdulkadir, Rahma and Caroline Ackley, 'The Role of Shari'a-Based Restorative Justice in the Transition from Armed Conflict to Peacebuilding: Do Somalis Hold the View That the Restorative Justice Aspects within Qisas Offer a Solution?' (2014) 14(2) *Northeast African Studies* 111

Abou El Fadl, Khaled, *Rebellion and Violence in Islamic Law* (CUP 2001)

Abou-El-Fadl, Reem 'Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will', (2012) 6 *IJTJ* 318

Abu-Lughad, Lila 'Writing Against Culture', in Richard G Fox, *Recapturing Anthropology: Working in the Present* (School of American Research Press 1991)

Abu-Odeh, Lama 'The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia' (2004) 52 *American Journal of Comparative Law* 789

Acosta, Mariclaire and Esa Ennelin, 'The "Mexican solution" to transitional justice' in Transitional Justice in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (CUP 2006)

Akaddaf, Fatima 'Application of the United Nations Convention on Con- tracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles' (2001) 13 *Pace Intl L Rev* 1

Akande, Dapo 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7(2) *Journal of International Criminal Justice* 333

— 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 10(2) *Journal of International Criminal Justice* 299

Akhavan, Payam 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' (1996) *AJIL* 501

Al-Azami, M Mustafa, *On Schacht's Origins of Muhammadan Jurisprudence* (Oxford Centre for Islamic Studies/Islamic Texts Society 1985)

Al-Azhar, *The Al-Azhar Declaration in Support for the Arab Revolutions,* 31 October 2011 (Adel Maged and Alice Panepinto trs) available at www.dur.ac.uk/ilm [accessed 30 June 2013]

— *The Al-Azhar Document on the Future of Egypt*, 21 June 2011, available in English at http://www.sis.gov.eg/En/Templates/Articles/tmpArti- cles.aspx?ArtID=56424 [accessed 30 June 2013]

Al-Jabri, Mohammad Abed, *Democracy, Human Rights and Law in Islamic Thought* (IB Tauris 2008)

Al-Omar, Fuad et al, *Islamic banking: Theory, practice and challenges*, (Zed Books, 1996)

Al-Ramahi, Aseel 'Sulh: A Crucial Part of Islamic Arbitration', (2008) LSE Law, Society and Economy Working Papers 12/2008 http://ssrn.com/abstract=1153659 [accessed 10 December 2012]

Ali, Shaheen Sardar and Javaid Rehman, 'The Concept of Jihad in International Islamic Law' (2005) 10(3) *Journal of Conflict & Security Law* 321

Allen, Tom 'Restitution and Transitional Justice in the European Court of Human Rights' (2006) 13 *Colum J Eur L* 1

Almqvist, Jessica, *Human Rights, Culture, and the Rule of Law* (Hart 2005)

Alsheikh, Essam A 'Distinction between the Concepts Mediation, Conciliation, Sulh and Arbitration in Shari'ah Law' (2011) 25 *Arab Law Quarterly* 367

Alsoufi Rana Hajaj Ahmaid, 'Strategies for the justifications of Ḥudūd Allah and their punishments in the Islamic tradition' (2012) Edinburgh Research Archive https://www.era.lib.ed.ac.uk/handle/1842/7989 [accessed 25 November 2014]

Alston, Philip 'Ships passing in the night: the current state of the human rights and development debate seen through the lens of the Millennium Development Goals' (2005) 27(3) *HRQ* 755

Amadiume, Ifi and Abdullahi An-Na'im (eds), *The Politics of Memory: Truth, Healing, and Social Justice* (Zed Books 2000)

Ambos, Kai, *The legal framework of transitional justice: a systematic study with a special focus on the role of the ICC* (Springer, 2009)

Anderson, JND 'The significance of Islamic Law in the World today' (1960) *American Journal of Comparative Law*, 187

Anghie, Antony 'Finding the peripheries: sovereignty and colonialism in nineteenth-century in- ternational law' (1999) 40 *Harv Intl LJ* 1

— *Imperialism, sovereignty and the making of international law* (CUP 2007)

An-Na'im, Abdullahi Ahmed *Islam and the secular state: Negotiating the future of Sharia* (Harvard University Press, 2009)

— 'Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives - A Preliminary Inquiry' (1990) 3 *Harv Hum Rts J* 13

— *Human rights in cross-cultural perspectives: A quest for consensus* (University of Pennsylvania Press 1995)

— 'Islam and Human Rights: Beyond the Universality Debate' (2000) 94 *Proceedings of the annual meeting of the American Society of International Law* 95

— 'The Best of Times and the Worst of Times: Human Agency and Human Rights in Islamic Societies" (2004) 1(1) *Muslim World Journal of Human Rights,* 1554

— *Toward an Islamic reformation: civil liberties, human rights, and international law* (Syracuse University Press 1996)

— 'Editorial Note: From the Neocolonial 'Transitional' to Indigenous Formations of Justice', (2013) 7 *IJTJ* 197

Antkowiak, Thomas M 'Truth as Right and Remedy in International Human Rights Experience' (2001-2002) 23 *MichJIL* 977

Anyanwu, Ogechi E 'Crime and justice in Postcolonial Nigeria: The justifications and Challenges of Islamic Law of Shari'ah' (2006) *Journal of Law and Religion* 315

Arajarvi, Noora 'Between lex lata and lex ferenda? Customary International (Criminal) Law and the Principle of Legality' (2011) 15 *Tilburg Law Review: Journal of International and European Law* 163

Arbour, Louise 'Economic and social justice for societies in transition' (2007-2008) 40 *NYU J Intl L & Pol* 1

Arendt, Hannah, *Eichmann in Jerusalem* (Penguin 1963)

Armatta, Judith 'Historical Revelations from the Milošević Trial' (2012) 36 *Southeastern Europe* 10

Aukerman, Miriam J 'Extraordinary evil, ordinary crime: A framework for understanding transitional justice' (2002) 15 *Harv Hum Rts J* 39

Assmann, Jan and John Czaplicka 'Collective memory and cultural identity' (1995) *New German Critique* 125

Austin, John Langshaw, *How to do things with words: The William James Lectures delivered in Harvard University in 1955 (*OUP 1962)

Avruch, Kevin 'Truth and reconciliation commissions: Problems in transitional justice and the reconstruction of identity' (2010) 47(1) *Transcultural Psychiatry* 33

B

Badar, Mohamed Elewa 'Islamic Law (*Shari'a*) and the Jurisdiction of the International Criminal Court' (2011) 24 *Leiden Journal of International Law* 407

Badr, Gamal Moursi 'A Survey of Islamic International Law' (1982) 76 *Proceedings of the annual meeting of the American Society of International Law* 56

— 'Islamic Law: Its relation to other legal systems' (1977-78) 26 *Am J Comp L* 187

Baderin, Mashood, *International Human Rights and Islamic Law* (OUP 2003)

— 'Religion and International Law: Friends or Foes?' (2009) 5 *European Human Rights Law Review* 637

Balint, Jennifer et al, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach' (2014) 8 *IJTJ*, 194

Balkin, Jack M. 'Deconstruction', in Dennis Patterson (ed), *A Companion of Philosophy of Law and Legal Theory* (Blackwell 2010)

—'The Proliferation of Legal truth' (2003) 26 *Harvard Journal of Law and Public Policy* 5

Barak, Aharon 'Human rights in times of terror – a judicial point of view' (2008) 28 *Legal Studies* 493

Barlas, Asma, *Believing women in Islam: Unreading patriarchal interpretations of the Qur'an* (University of Texas Press 2009)

Barraclough, Steven 'Al-Azhar: Between the government and the Islamists' (1998) 52 *The Middle East Journal* 236

Barsalou, Judy 'Trauma and transitional justice in divided societies' (2005) United States Institute for Peace Special Report 135

Barsalou, Judith Marie and Victoria Baxter, *The urge to remember: the role of memorials in social reconstruction and transitional justice* (United States Institute of Peace 2007)

Bassiouni, M Cherif, 'Functional Approach to General Principles of International Law' (1989) 11 *Mich J Intl L* 768

— 'Crimes and the Criminal Process' (1997) 12 (3) *Arab Law Quarterly* 269

—'International Recognition of Victims' Rights' (2006) 6(2) *Human Rights Law Review* 203

— *The Islamic Criminal Justice System* (Oceana Publications, 1982)

— *The Shari'ah, Islamic Law and Post-Conflict Justice* (distributed at the 11th Specialization Course in International Criminal Law, International Institute of Higher Studies in Criminal Sciences (ISISC) Siracusa, 2011)

Baxi, Upendra 'Too many, or too few, human rights?' (2001) 1 *HRLR* 1

— 'The colonial heritage' in in Pierre Legrand and Roderick Munday (eds) *Comparative Legal Studies* (CUP 2011)

Beal, John P, James A Coriden, and Thomas Joseph Green (eds), *New Commentary on the Code of Canon Law* (Paulist Press 2000)

Bell, Christine 'The "New Law" of Transitional Justice', in K. Ambos et al (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Springer-Verlag 2009)

Bell, Christine and Catherine O'Rourke, 'Does feminism need a theory of transitional justice? An introductory essay' (2007) 1(1) *IJTJ* 23

Ben-Naftali, Orna & Keren Michaeli, 'We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings' (2003-2004) 36 *Cornell Intl L J* 233

Berman, Jesse 'The Cuban Popular Tribunals' (1969) 69 *Columbia Law Review* 1317

Berman, Nathaniel 'The Sacred Conspiracy: Religion, Nationalism, and the Crisis of Internationalism' (2011) 25(1) *Leiden Journal of International Law* 9

Bevernage, Berber, *History, Memory and State-Sponsored Violence* (Routledge 2012)

Bickford, Louis 'Unofficial Truth Projects', (2007) 29 *HRQ* 994

Bielefeldt, Heiner '"Western" versus "Islamic" Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights' (2000) *Political Theory* 90

Bisset, Alison, *Truth Commissions and Criminal Courts* (CUP 2012)

Bleicher, Samuel 'UN v IBRD: A Dilemma of Functionalism,' (1970) 24(1) *International Organization* 31

Bobbio, Norberto, *L'età dei diritti* (Einaudi 1990)

Boesenecker, Aaron P. and Leslie Vinjamuri, 'Lost in Translation? Civil Society, Faith-Based Organizations and the Negotiation of International Norms' (2011) 5 *IJTJ* 345

Bohlander, Michael 'Political Islam and Non-Muslim Religions - A Lesson from Lessing for the Arab Transition' (2014) 25(1) *Islam and Christian-Muslim Relations* 27

— ‘Paradise postponed? For a judge-led generic model of international criminal procedure and an end to draft-as-you-go’ (2014) *Netherlands Yearbook of International Law* 45

— ‘Sisters in Law—Using Maqāṣid al-Shariʿah to Advance the Conversation between Islamic and Secular Legal Thinking’ (2014) 28(3) *Arab Law Quarterly* 257

Bohlander, M and MM Hedayati-Khakhi, ‘Criminal Justice under Shari’ah in the 21st Century – An Inter-Cultural View’ (2009) 23 *Arab Law Quarterly* 417

Bohoslavsky, Juan Pablo ‘Tracking Down the Missing Financial Link in Transitional Justice’ (2012) 1 *International Human Rights Law Review* 54

Bohoslavsky, Juan Pablo and Veerle Opgenhaffen, ‘The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship’ (2010) 23 *Harvard Human Rights Journal* 157

Bohoslavsky, Juan Pablo and Mariana Rulli, ‘Corporate Complicity and Finance as a ‘Killing Agent’: The Relevance of the Chilean Case’ (2010) 8 *Journal of International Criminal Justice* 829

Boraine, Alexander ‘Transitional Justice: a Holistic Interpretation’ (2006) 60 *Journal of International Affairs* 17

Boucher, David ‘The Recognition Theory of Rights, Customary International Law and Human Rights’ (2011) 59(3) *Political Studies* 753

Boyle, Alan ‘Soft law in international law-making' in Malcom D Evans (ed), *International Law* (OUP 2010)

Bradford, William C ‘The Duty to Defend Them: A Natural Law Justification for the Bush Doctrine of Preventive War’ (2003) 79 *Notre Dame L Rev* 1365

Brems, Eva ‘Enemies or allies? Feminism and cultural relativism as dissident voices in human rights discourse’ (1997) 19 *HRQ* 136

— *Human rights: Universality and diversity* (Martinus Nijhoff Publishers 2001)

— ‘Transitional Justice in the Case Law of the European Court of Human Rights’ (2011) 5 *IJTJ* 282

Brown, Nathan J ‘Post-Revolutionary Al-Azhar’ (2011) The Carnegie Papers, Middle East, 5 et seq

Brown, Jonathan AC, *Hadith: Muhammad's Legacy in the Medieval and Modern World* (One World Publications 2009)

Brown Scott, James, *The Catholic conception of international law: Francisco de Vitoria, founder of the modern law of nations, Francisco Suárez, founder of the modern philosophy of law in general and in particular of the law of nations: a critical examination and a justified appreciation* (Carnegie endowment for international peace 1934)

Bruinsma, Fred J ‘The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)’ (2007) 2 *Recht der Werkelijkheid* 7

Bruinsma, FJ and Matthijs de Blots, ‘Rules of Law from Westport to Wladiwostok: Separate Opinions in the European Court of Human Rights’ (1997) 15 *NethQHR* 175

Buergenthal, Thomas and Robert Norris, *Protecting human rights in the Americas: selected problems* (NP Engel 1990)

Burke-White, William W. ‘International Legal Pluralism’ (2003-2004) 25 *Michigan Journal of International Law* 963

Bussani, Mauro and Ugo Mattei ‘The Common Core Approach to the European Private Law’ (1997/1998) 3 *Columbia Journal of European Law* 339

Butler, Judith ‘Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory’ (1988) 40(4) *Theatre Journal* 519

—‘Burning Acts: Injurious Speech’ (1996) 3 *U of Chicago Law School Roundtable* 199

C

Campbell, Kirsten ‘The gender of transitional justice: Law, sexual violence and the International Criminal Tribunal for the Former Yugoslavia’ (2007) 1(3) *IJTJ* 411

Campbell, Colm and Catherine Turner, 'Utopia and the doubters: truth, transition and the law' (2008) 28(3) *Legal Studies* 374

Cançado Trindade, Antônio Augusto 'Enforced disappearances of persons as a violation of Jus Cogens: The contribution of the jurisprudence of the Inter-American Court of Human Rights' (2012) 81 *Nordic Journal of International Law* 507

Cappel, Andrew J 'Bridging Cultural Practice into Law: Ritual and Social Norms Jurisprudence' (2002-2003) 43 *Santa Clara Law Review* 389

Carranza, Ruben 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' (2008) 2 *IJTJ* 310

Carrozza, Paolo G ''My Friend is a Stranger': The Death Penalty and the Global Ius Commune of Human Rights' (2003) 81 *Texas Law Review* 1031

— 'Uses and misuses of comparative law in international human rights: Some reflections on the jurisprudence of the European Court of Human Rights' (1997-1998) 73 *Notre Dame Law Review* 1217

Cassese, Antonio 'Reflections on international criminal justice' (1998) 61 (1) *Modern Law Review* 1

— 'On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law' (1998) 9(1) *EJIL* 2

Cerna, Christina M 'El-Masri v. The Former Yugoslav Republic of Macedonia (Eur. Ct. H.R.), Introductory Note' (2013) 52 *International Legal Materials* 558

Chapman, Chris, *Transitional Justice and the Rights of Minorities and Indigenous Peoples, Research Brief* (New York, International Center for Transitional Justice 2009)

Chatham House, *Transitional Justice and the Arab Spring*, 1 February 2012, report available at http://www.chathamhouse.org/publications/papers/view/182300 [accessed 15 November 2013] (attended)

Chinkin, Christine M 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850

Clark, Phil, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers* (CUP 2010)

Clifford, James, *The Predicament of Culture: Twentieth-Century Ethnography, Literature and Art* (Harvard University Press 1988)

Cole, Catherine M 'Performance, Transitional Justice, and the Law: South Africa's Truth and Reconciliation Commission' (2007) 59 *Theatre Journal* 167

Cole, Elizabeth A. 'Transitional justice and the reform of history education' (2007) 1(1) *IJTJ* 115

Cornell, Drucilla, *The Philosophy of the Limit* (Routledge 1992)

Condorelli, Luigi and Annalisa Ciampi 'Comments on the Security Council Referral of the Situation in Darfur to the ICC' (2005) 3(3) *Journal of International Criminal Justice* 590

Coulson, Noel J, *A History of Islamic Law* (Edinburgh University Press 1964)

— 'The State and the Individual in Islamic Law' (1957) 6 *ICLQ* 57

Cover, Robert 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601

Crawford, James and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012)

Crecelius, Daniel 'Al-Azhar in the revolution' (1966) 20(1) *The Middle East Journal* 31

Crenzel, Emilio 'Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice', (2008) 2 *IJTJ* 173

Cronin-Furman, Kate 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7 *IJTJ* 434

Cryer, Robert et al, *An introduction to international criminal law and procedure* (CUP 2007)

Culcasi, Karen 'Constructing and naturalizing the Middle East' (2010) 100(4) *Geographical Review* 583;

D'Amato, Anthony 'Trashing Customary International Law' (1987) 81 *AJIL* 101

Dalacoura, Katerina 'The 2011 uprisings in the Arab Middle East: political change and geopolitical implications' (2012) 88(1) *International Affairs* 63

Darby, Derrick, *Rights, Race, and Recognition* (CUP 2009)

David, René and E.C. Brierley, The Major Legal Systems of the World Today (Stevens and Sons 1985)

David, Roman and Susanne YP Choi, 'Victims of transitional justice: Lessons from the reparation of human rights abuses in the Czech Republic' (2005) 27(2) *HRQ* 392

— 'Getting Even or Getting Equal? Retributive Desires and Transitional Justice' (2009) 30(2) *Political Psychology* 161

Davidson, Eugene, *The Trials of the Germans: An Account of the Twenty-two Defendants Before the International Military Tribunal at Nuremberg* (University of Missouri Press 1966)

Davis, Howard & Melanie Klinkner, 'A Victim's Right to Truth and the ICC' (2013), available at http://www.nuffieldfoundation.org/victims-right-truth-and-icc [accessed 12 January 2015]

DeFalco, Randle C 'Accounting for Famine at the Extraordinary Chambers in the Courts of Cambodia: The Crimes against Humanity of Extermination, Inhumane Acts and Persecution' (2011) 5 *IJTJ* 142

de Greiff, Pablo 'Some Thoughts on the Development and Present State of Transitional Justice' (2011) 5(2) *Journal for Human Rights/Zeitschrift für Menschenrechte* 98

— 'Theorizing transitional justice', in Jon Elster, Rosemary Nagy and Melissa Williams (eds) *Transitional Justice: Nomos LI* (NYU Press 2012)

— 'Vetting and transitional justice' (2007) in Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice As Prevention: Vetting Public Employees in Transitional Societies* (New York: Social Science Research Council, 2007)

de Greiff, Pablo and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (Social Science Research Council and International Center for Transitional Justice 2009)

De Schutter, Olivier, *International Human Rights Law* (CUP 2010)

de Sousa Santos, Boaventura 'Law: A map of misreading. Toward a Postmodern Conception of Law' (1987) 14 *JL & Socy* 279

Dennerlein, Bettina 'Remembering violence, negotiating change: The Moroccan Equity and Reconciliation Commission and the Politics of Gender' (2012) 8(1) *Journal of Middle East Women's Studies* 10

Derrida, Jacques, *Prophets of Extremity* (University of California Press 1985)

— *Of Grammatology* (transl. Gayatri Chakravorty Spivak tr, Johns Hopkins University Press 1976)

— 'Force of Law' (1989-90) 11 *Cardozo L Rev* 920

des Forges, Alison and Timothy Longman, 'Legal responses to genocide in Rwanda' in Eric Stover & Harvey M. Weinstein (eds) *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (CUP 2004)

Dixon, Rosalind 'Rape as a Crime in International Humanitarian Law: Where to from here?' (2002) 13(3) *EJIL* 697

Dixon, Peter and Chris Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims' (2013) 7 *IJTJ* 393

Doak, Jonathan, *Victims' Rights, Human Rights and Criminal Justice* (Hart 2008)

— 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions' (2011) 11(2) *International Criminal Law Review* 263

Donnelly, Jack 'Cultural relativism and universal human rights' (1984) *HRQ* 400

— 'The relative universality of human rights' (2007) 29(2) *HRQ* 281

Dostal, Robert J (ed) *The Cambridge Companion to Gadamer* (CUP 2002)

Douzinas, Costas, *Human rights and empire: the political philosophy of cosmopolitanism* (Routledge 2007)

Droege, Cordula 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 *Isr L Rev* 310

Drumbl, Mark ‘Book Review: Kenneth Gallant, *The Principle of Legality in International and Comparative Criminal Law*, CUP 2009’, (2009) 31 *HRQ* 801

Dupret, Baudouin ‘La sharî'a comme référent législatif’ (1995) 34 *Revue interdisciplinaire d'études juridiques* 99

— *Practices of Truth: An Ethnomethodological Inquiry into Arab Contexts* (John Benjamins Publishing 2011)

Dupret, Baudouin, Barbara Drieskens and Annelies Moors (eds), *Narratives of Truth in Islamic Law* (IB Tauris 2008)

Durkheim, Emile, *The Division of Labour in Society* (first published 1893, Simon and Schuster, 2014)

Duthie, Roger ‘Toward a development-sensitive approach to transitional justice’ (2008) 2(3) *IJTJ* 292

Duxbury, Neil ‘Post-realism and legal process’, in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell 1999)

Dworkin, Ronald ‘The Elusive Morality of Law’ (1965) 10 *Vill L Rev* 631

— ‘Philosophy, Morality, and Law: Observations Prompted by Professor Fuller's Novel Claim’ (1965) *U Penn L Rev* 668

Dyzenhaus, David, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (OUP 2012)

—‘Schmitt v. Dicey: Are states of emergency inside or outside the legal order’ (2006) 27 *Cardozo L Rev* 2005

E

El-Gamal, Mahmoud A. *Islamic Finance: Law, Economics, and Practice* (CUP 2006)

Elliesie, Hatem (ed), *Beiträge zum Islamischen Recht VII: Islam und Menschenrechte/Islam and Human Rights* (Peter Lang 2010)

Elster, Jon ‘Emotions and transitional justice’ (2003) *Soundings* 17

— ‘Coming to terms with the past. A framework for the study of justice in the transition to democracy’, (1998) 39(1) *European Journal of Sociology* 7

Engstrom, Par ‘Transitional Justice and Ongoing Conflict’ in Chandra Lekha Sriram et al (eds), Transitional justice and peacebuilding on the ground: Victims and ex-combatants (London: Routledge, 2012)

Esposito, John L (ed) ’Mazalim Courts’ in *The Oxford Dictionary of Islam* (Oxford Islamic Studies Online) http://www.oxfordislamicstudies.com/article/opr/t125/e1487 [accessed 14 Dec 2012]

Evans, Carolyne ‘The Double-Edged Sword: Religions Influences on International Humanitarian Law’ (2005) 6 *Melbourne Journal of International Law* 1

Ewald, William ‘Comparative jurisprudence (II): the logic of legal transplants’ (1995) *American Journal of Comparative Law* 489

F

Fabbrini, Federico ‘The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism’ (2014) 14(1) *HRLR* 85

Fadel, Mohammad ‘International Law, Regional Developments: Islam’ in *Max Planck Encyclopaedia of Public International Law* (Max Planck Institute of Public International Law 2010)

— ‘Two women, one man: knowledge, power, and gender in medieval Sunni legal thought’ (1997) 29(2) *International Journal of Middle East Studies* 185

Falk, Richard, ‘Religion and Global Governance: Harmony or Clash’ (2002) 19 *International Journal of World Peace* 2

Finch, George A ‘The Nuremberg Trial and International Law’ (1947) 41(1) *AJIL* 20

Fischer-Lescano, Andreas & Gunther Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2003-2004) 25 *Michigan Journal of International Law* 999

Fisher, Kirsten, *Transitional Justice for Child Soldiers: Accountability and Social Reconstruction in Post-Conflict Contexts* (Palgrave 2013)

Fleck, Dieter (ed), *The Handbook of International Humanitarian Law* (Third Edition, OUP 2013)

Fletcher, George P 'Comparative Law as a Subversive Discipline' (1998) *American Journal of Comparative Law* 683

Fletcher, Laurel E and Harvey M Weinstein 'Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective' (2009) 31(1) *HRQ* 163

Forowicz, Magdalena, *The Reception of International Law in the European Court of Human Rights* (OUP 2010)

Foucault, Michel, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Colin Gordon ed, Harvester Wheatsheaf 1980)

Franke, Katherine M 'Gendered subject of transitional justice' (2006) 15 *Colum J Gender and L* 813

Frankenberg, Günter 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411

— 'Stranger than Paradise: Identity and Politics in Comparative Law' (1997) 2 *Utah Law Review* 259

Freeman, Alan D 'Truth and Mystification in Legal Scholarship' (1981) 90(5) *Yale Law Journal* 1229

Freeman Jalet, Frances T 'The Quest for the General Principles of Law Recognized by Civilized Nations - A Study' (1962) 10 *UCLA Law Review* 1041

French, Rebecca R 'A Conversation with Tibetans? Reconsidering the Relationship between Religious Beliefs and Secular Legal Discourse' (2001) 26(1) *Law and Social Inquiry* 95

— 'The Case of the Missing Discipline: Finding Buddhist Legal Studies' (2004) 52 *Buff L Rev* 679

Fuller, Lon L, *The Morality of Law* (Yale University Press 1964)

— 'American Legal Realism' (1934) 82(5) *University of Pennsylvania Law Review and American Law Register* 429

Fukuyama, Francis, *The end of history and the last man* (Penguin, 1992)

Funkenstein, Amos 'Collective memory and historical consciousness' (1989) *History and Memory* 5

G

Gadamer, Hans-Georg, *Truth and Method* (Sheed and Ward 1975)

— *Philosophical Hermeneutics* (University of California Press 2008)

Gaeta, Paola 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law' (1999) 10 *EJIL* 172

Gallant, Kenneth, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2009)

Garibian, Sevane 'Ghosts Also Die: Resisting Disappearance through the 'Right to the Truth'and the Juicios por la Verdad in Argentina' (2014) 12 *Journal of International Criminal Justice* 515

Garland, David, *Punishment and Modern Society* (OUP 1990)

Gaus, Gerald F 'The Rights Recognition Thesis: Defending and Extending Green', in Maria Dimova-Cookson and William J. Mander (eds), *T. H. Green: Ethics, Metaphysics, and Political Philosophy* (OUP 2006)

Geertz, Clifford, *Further Essays in Interpretative Anthropology* (1983)

— *The Interpretation of Cultures* (Basic Books 1973)

Gegout, Catherine 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace' (2013) 34(5) *Third World Quarterly* 800

Gewirtz, Paul 'Victims and Voyeurs at the Criminal Trial' (1995-1996) 90 *Nw U L Rev* 863

Gibson, James L. 'The Contributions of Truth to Reconciliation Lessons From South Africa' (2006) 50(3) *Journal of Conflict Resolution* 409

Glenn, H Patrick 'Legal Cultures and Legal Traditions' in Mark Van Hoeck (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004)

Goldsmith, Jack L and Eric A Posner 'A Theory of Customary International Law' (November 1998) The Chicago Working Paper Series in Law and Economics (Second Series), available at: http://www.law.uchicago.edu/Lawecon/workingpapers.html [accessed 5th October 2013]

— *The limits of international law* (Oxford University Press 2005)

Goldstein, Judith and Robert Keohane, 'Ideas and Foreign Policy: An Analytical Framework' in Judith Goldstein and Robert O. Keohane (eds) *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca, N.Y.: Cornell University Press, 1993)

Goldston, James A 'More Candour about Criteria The Exercise of Discretion by the Prosecutor of the International Criminal Court' (2010) 8(2) *Journal of International Criminal Justice* 383

Goldstone, Richard J 'Prosecuting Rape as a War Crime' (2002) 34 *Case W Res J Intl L* 277

Goldziher, Ignác, *Muslim Studies* (Transaction Publishers 2005) (first published in German in 1889-1890)

Gonzalez Cueva, Eduardo 'The Peruvian Truth and Reconciliation Commission and the challenge of impunity' in in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (CUP 2006)

González, Eduardo and Howard Varney (eds), *Truth Seeking: Elements of Creating an Effective Truth Commission* (Brasilia, Amnesty Commission of the Ministry of Justice of Brazil; New York, International Center for Transitional Justice 2013)

Goodhart, Michael 'Neither relative nor universal: A response to Donnelly' (2008) 30(1) *HRQ* 183

Gordley, James 'The Universalist Heritage' in Pierre Legrand and Roderick Munday (eds) *Comparative Legal Studies* (CUP 2011)

Gorecki, Jan, *Sociology and Jurisprudence of Leon Petrazycki* (Urbana University of Illinois Press 1975)

Gray, David 'An Excuse-Centered Approach to Transitional Justice' (2005-2006) 74 *Fordham Law Review* 2621

— 'What's so special about transitional justice? Prolegomenon for an excuse-centred approach to transitional justice' in (2006) 100 *Proceedings of the annual meeting of the American Society of International Law* 147

— 'Devilry, Complicity and Greed: Transitional Justice and Odious Debt' (2007) 70 *Law and Contemporary Problems* 137

Graziadei, Michele 'The functionalist heritage'Pierre Legrand and Roderick Munday (eds) *Comparative Legal Studies* (CUP 2011)

Gready, Paul and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 *IJTJ* 339

Green, LC 'Comparative law as a 'source' of international law' (1967-1968) 42 *Tulane Law Review* 52

Greenwood, Christopher 'International Humanitarian Law and the Tadic Case' (1996) 7 *EJIL* 265

Grenfell, Laura 'Legal Pluralism and the Rule of Law in Timor Leste' (2006) 19 *Leiden Journal of Intl Law* 305

Griffin, James, *On Human Rights* (OUP 2008)

Griffiths, Anne et al 'Space and legal pluralism: an introduction' in Anne Griffiths, Franz von Benda-Beckmann, Keebet von Benda-Beckmann (eds) *Spatializing Law: An Anthropological Geography of Law in Society* (Ashgate 2009)

Griffiths, John 'What is legal pluralism?' (1986) 18(24) *The Journal of Legal Pluralism and Unofficial Law,* 1

Groome, Dermot 'Identifying Synergies between the Right to the Truth and International/Domestic Criminal Law in combating Impunity' (2011) 29 *BerkJIL* 175

Gunning, Isabelle R 'Modernizing Customary International Law: The Challenge of Human Rights' (1990) 31 *VaJIL* 211

H

Habermas, Jürgen 'Religion in the public sphere' (2006) 14(1) *European Journal of Philosophy* 1

Hafner, Donald L and Elizabeth BL King, 'Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Can and Should Work Together' (2007) 30 *BC Intl & Comp L Rev* 91

Hale, Brenda 'Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 *HRLR* 65

Hall, Stephen, 'The persistent spectre: natural law, international order and the limits of legal positivism' (2001) 12(2) *EJIL* 269

Hall, Stuart 'Cultural Studies: Two Paradigms', in Nicholas B Dirks et al (eds) *Culture/Power/History: A Reader in Contemporary Social History* (Princeton University Press 1993)

Hallaq, Wael B, *An Introduction to Islamic Law* (CUP 2009)

— *Authority, continuity and change in Islamic law* (CUP 2001)

— 'Can the Sharia Be Restored?' in Yvonne Yazbeck Haddad and Barbara Freyer Stowasser (eds), *Islamic Law and the Challenges of Modernity* (Altamira Press 2004)

—'From Fatwas to Furu: Growth and Change in Islamic Substantive Law' (1994) 1(1) *Islamic Law and Society*, 29

—'Juristic authority vs. state power: the legal crises of modern Islam' (2003) *The Journal of Law and Religion* 243

— 'Muslim rage and Islamic law' (2002) 54 *Hastings LJ* 1705

— *Shari'a* (CUP 2009)

— *The Origins and Evolution of Islamic Law* (CUP 2005)

— 'Was the gate of ijtihad closed?' (1984) 16(1) *International Journal of Middle East Studies* 3

Hamad, Mahmoud 'Egypt's Litigious Transition: Judicial Intervention and the Muddied Road to Democracy' (2013) Atlantic Council Issue Brief, Hariri Centre for the Middle East, available at http://www.acus.org/publication/egypts-litigious-transition-judicial-intervention-and-muddied-road-democracy [accessed 15 June 2013].

Hamber, Brandon 'Masculinity and transitional justice: an exploratory essay' (2007) 1(3) *IJTJ* 375

Hann, Matthew J 'Egalitarian Rights Recognition: A Political Theory of Human Rights' (Doctoral thesis, Durham University 2013)

Harris, Bronwyn et al 'Bringing Justice to Unacceptable Health Care Services? Street-Level Reflections from Urban South Africa' (2014) 8 *IJTJ* 141

Harris, David J and Stephen Livingstone (Eds), *The inter-American system of human rights* (Clarendon Press 1998)

Hart, HLA 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593

Hascall, Susan C 'Restorative Justice in Islam: Should Qisas Be Considered a Form of Restorative Justice' (2011) 4 *Berkeley J Middle E & Islamic L* 35

Hathaway, Oona A 'Do human rights treaties make a difference?' (2002) *Yale Law Journal* 1935

Hayner, Priscilla B, 'Fifteen truth commissions-1974 to 1994: A comparative study' (1994) 16 *HRQ* 597

— *Unspeakable truths: Facing the challenge of truth commissions* (Routledge 2002)

— *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2011)

Heidegger, Martin, *The Essence of Truth* (Continuum 2002)

Helmholz, Richard H 'The Early History of the Grand Jury and the Canon Law' (1983) 50 *The University of Chicago Law Review* 613

Hicks, Stephen C 'The Jurisprudence of Comparative Legal Systems' (1983) 6 *Loy LA Intl and Comp LJ* 83

Hilbink, Lisa, *Judges beyond politics in democracy and dictatorship: Lessons from Chile* (CUP 2007)

Hobsbawm, Eric and Terence Ranger (eds), *The Invention of Tradition* (CUP 1983)

Horowitz, Donald L. 'Conciliatory institutions and constitutional processes in post-conflict states' (2007) 49 *Wm & Mary L Rev* 1213

Huggins, Chris 'Linking broad constellations of ideas: Transitional justice, land tenure reform, and development' in Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (Social Science Research Council and International Center for Transitional Justice 2009)

Human Rights Watch, 'Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts' (2011) available at http://www.hrw.org/sites/default/files/reports/rwanda0511webwcover.pdf [accessed 15 June 2014]

Huntington, Samuel P, 'Clash of Civilisations?' (1993) 72(3) *Foreign Affairs* 22

— *The third wave: democratization in the late twentieth century* (1991)

Huyse, Luc 'Justice after transition: On the choices successor elites make in dealing with the past' (1995) 20(1) *Law & Social Inquiry* 51

Huysmans, Jef 'The Jargon of Exception: On Schmitt, Agamben and the Absence of Political Society' (2008) 2(2) *International Political Sociology* 165

I

Ifeonu, Eberechi 'Customary International Law (CIL) and Jus Cogens in an Expanded International Community: Reflection on the Evolution of International Crimes Subject to Universal Jurisdiction from Third World Perspective' (2014), available at http://works.bepress.com/eberechi_ifeonu/2/ [accessed 12 Jan 2015]

Ignatieff, Michael, *Human rights as politics and idolatry* (Princeton University Press 2001)

— 'Articles of Faith' (1996) 25(5) *Index on Censorship* 113

Imber, Colin, *Ebu's-su'ud: The Islamic Legal Tradition* (Edinburgh University Press 1997)

Inalcik, Halil, *The Ottoman Empire: 1300-1600* (Hachette UK 2013); Donald Quataert, *The Ottoman Empire, 1700–1922* (CUP 2008)

International Law Association, American Branch, Committee on the Formation of Customary Law, *Report of the Committee on the Formation of Customary Law, The Role of State Practice in the Formation of Customary and Jus Cogens Norms of International Law* (1987-1988)

Iqbal, Zubair and Abbas Mirakhor, *Islamic banking* (International monetary fund (IMF) 1987)

Isser, Deborah (ed), *Customary Justice and the Rule of Law in War-torn Societies* (United States Institute of Peace Press 2011)

J

Jackson, John and Sean Doran, 'Evidence', in Dennis Patterson (ed), *A companion of Philosophy of Law and Legal Theory* (Blackwell 1996)

Jamar, Steven D. 'Religion and International Law' (2001) 16 *Journal of Law and Religion* 609

Jansen, Nils, 'Comparative Law and Comparative Knowledge' in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (OUP 2006)

Jaquemet, Iolanda 'Fighting Amnesia: Ways to Uncover the Truth about Lebanon's Missing' (2009) 3 *IJTJ* 69

Jenkins, Catherine 'Taking Apology Seriously', in M du Plessis and S Pete (eds), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (Intersentia 2007)

Johansen, Baber 'Truth and validity of the Qadi's judgment. A legal debate among Muslim Sunnite jurists from the 9th to the 13th centuries' (1997) 14 *Recht van de Islam* 1

K

Kahn−Freund, Otto 'On Uses and Misuses of Comparative Law' (1974) 37(1) *Modern Law Review* 1

Kamali, Mohammad Hashim, *A Textbook of Hadith Studies* (The Islamic Foundation 2005)

— ‘Appellate Review and Judicial Independence in Islamic Law’ (1990) 29(3) *Islamic Studies* 215

— ‘Fundamental Rights of the Individual: An Analysis of Haqq (Right) in Islamic Law’ (1993) 10(3) *American Journal of Islamic Social Sciences* 340

—‘*Maqasid al-Shari’ah*: the Objectives of Islamic Law’ (1999) 38(2) *Islamic Studies*, 193

— *Principles of Islamic Jurisprudence* (3rd Edition, The Islamic Texts Society 2003)

— ‘Punishment in Islamic law: A critique of the hudud bill of Kelantan, Malaysia’ (1998) 13(3) *Arab Law Quarterly* 203

— *Shari’ah Law: An Introduction* (One World Publications 2008)

Kelly, J Patrick ‘The Twilight of Customary International Law’ (1999-2000) 40 *VaJIL* 449

Kelsen, Hans ‘Will the judgment in the Nuremberg trial constitute a precedent in international law’ (1947) 1 *Intl LQ* 153

— ‘Sovereign Equality of States’ (1994) 53 *Yale Law Journal* 207

Kennedy, David ‘International Human Rights Movement: Part of the Problem?’ (2002) 15 *Harv Hum Rts J* 101

— ‘New Approaches to Comparative Law: Comparativism and International Governance’, (1997) *Utah Law Review* 545

— ‘The International Human Rights Regime: Still Part of the Problem?’ in Rob Dickinson, Elena Katselli, Colin Murray and Ole W. Pedersen (eds) Examining Critical Perspectives on Human Rights (CUP 2013)

— ‘The methods and the politics’ in Pierre Legrand and Roderick Munday (eds) *Comparative Legal Studies* (CUP 2011)

Kennedy, Duncan ‘Legal formality’ (1973) *The Journal of Legal Studies* 351

Khadduri, Majid ‘Islam and the Modern Law of Nations’ (1956) 50(2) *AJIL* 358

— ‘Nature and Sources of Islamic Law’ (1953) 22 *Geo Wash L Rev* 3

— *The Islamic law of nations: Shaybani's Siyar* (Johns Hopkins University Press 1966)

— *War and Peace in the Law of Islam* (Johns Hopkins University Press 1955)

Kim, Hunjoon and Kathryn Sikkink, ‘Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries’ (2010) 54(4) *International Studies Quarterly* 939

King, Elizabeth B. Ludwin ‘A Conflict of Interests: Privacy, Truth and Compulsory DNA Testing for Argentina's Children of the Disappeared’ (2011) 44 *Cornell International Law Journal* 535

Kingsbury, Benedict ‘Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law’ (2002) 13(2) *EJIL* 401

Koskenniemi, Martti, *The Gentle Civiliser of Nations* (CUP 2004)

— ‘Between Impunity and Show Trials’ (2002) 6 *Max Planck UNYB* 1

Kosovo Memory book, available at http://www.kosovskaknjigapamcenja.org/?page_id=29 [accessed 18 July 2013]

Kritz, Neil J (ed), *Transitional justice: how emerging democracies reckon with former regimes* (United States Institute of Peace Press 1995)

— ‘The Dilemmas of Transitional Justice’, in *Transitional justice: how emerging democracies reckon with former regimes* (United States Institute of Peace Press 1995)

Kunz, Josef L, ‘Natural-law thinking in the modern science of international law’ (1961) *AJIL* 951

— ‘The Nature of Customary International Law’ (1953) 47 *AJIL* 662

L

Lambourne, Wendy ‘Transitional justice and peacebuilding after mass violence’ (2009) 3(1) *IJTJ*, 28

Laplante, Lisa J and Kimberly Theidon, ‘Transitional justice in times of conflict: Colombia's Ley de Justicia y Paz’ (2006) 28 *Mich J Intl L* 49

Landsman, Stephan ‘Alternative responses to serious human rights abuses: of prosecution and truth commissions.’ (1996) *Law and Contemporary Problems* 81

Laplante, Lisa J. ‘Outlawing amnesty: the return of criminal justice in transitional justice schemes’ (2008) 49 *Va J Intl L* 915

— ‘Transitional justice and peace building: Diagnosing and addressing the socioeconomic roots of violence through a human rights framework’ (2008) 2(3) *IJTJ* 331

Lauterpacht, Hersch, *The Development of International Law by the International Court* (Stevens 1958)

Lee, Luke T and Whalen W Lai, ‘Chinese Conceptions of Law: Confucian, Legalist, and Buddhist’ (1977) 29 *Hastings LJ* 1307

Leebaw, Bronwyn Anne ‘The irreconcilable goals of transitional justice’ (2008) 30(1) *HRQ* 95

Legrand, Pierre ‘The Same and the Different’ in Pierre Legrand and Roderick Munday (eds) *Comparative Legal Studies* (CUP 2011)

Leigh, Ian and Rex Ahdar ‘Post-Secularism and the European Court of Human Rights: Or How God Never Really Went Away’ (2012) 75(6) *MLR* 1064

Brian Leiter, ‘Legal realism’, in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell 1999)

Letsas, George, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007)

Levit, Janet K ‘Bottom-up International Lawmaking: Reflections on the New Haven School of International Law’ (2007) 32 *Yale J Intl L* 393

Lewis, Mervyn and Latifa M Algaoud, *Islamic banking* (Edward Elgar, 2001)

Lillich, Richard B ‘The Growing Importance of Customary International Human Rights Law’ (1995) 25 *GaJICL* 1

Lippman, Matthew ‘Islamic criminal law and procedure: religious fundamentalism v. modern law’ (1989) 12 *BC Intl and Comp L Rev* 12

Lippman, Matthew, Sean McConville, and Mordechai Yerushalmi, *Islamic Criminal Law and Procedure: An Introduction* (New York: Praeger, 1988)

Lipscomb, Rosanna ‘Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan’ (2006) 106 *Columbia Law Review* 182

Litowitz, Douglas ‘Gramsci, Hegemony, and the Law’ (2000) *BYU Law Review* 515

Little, David ‘A Different Kind of Justice: Dealing with Human Rights Violations in Transitional Societies’ (1999) 13(1) *Ethics & International Affairs* 65

Llewellyn, Jennifer J and Robert Howse, ‘Institutions for restorative justice: The South African truth and reconciliation commission’ (1999) *University of Toronto Law Journal* 355

Llewellyn, Karl N ‘Some Realism about Realism: Responding to Dean Pound’ (1931) 44(8) *Harvard Law Review* 1222

Lowe, EJ and A Rami (eds), *Truth and Truth-Making* (Acumen 2009)

Luhrmann, TM ‘Review of Hermes’ Dilemma and Hamlet’s Desire: On the Epistemology of Interpretation’ (1993) 95 *American Anthropologist* 1058

Lundy, Patricia and Mark McGovern, ‘Whose Justice? Rethinking Transitional Justice from the Bottom Up’ (2008) 35(2) *Journal of Law and Society* 265

M

Macklem, Patrick ‘Rybná 9, Praha 1: Restitution and Memory in International Human Rights Law’ (2005) 16 *EJIL* 1

Maculan, Elena ‘Prosecuting International Crimes at National Level: Lessons from the Argentine ‘Truth-Finding Trials’’ (2012) 8(1) *Utrecht Law Review* 106

Madlingozi, Tshepo ‘On transitional justice entrepreneurs and the production of victims’ (2010) 2(2) *Journal of Human Rights Practice* 208

Maged, Adel ‘Commentary on the Al-Azhar Declaration in Support of the Arab Revolutions’ (2012) 4(3) *Amsterdam Law Forum*, 69

— ‘Arab and Islamic Shari’a Perspectives on the Current System of International Criminal Justice’ (2008) 8(3) *International Criminal Law Review* 477

Maira, Sunaina ‘“Good" and “bad” Muslim citizens: feminists, terrorists, and US Orientalisms’ (2009) *Feminist Studies* 631

Makdisi, John ‘Legal logic and equity in Islamic law’ (1985) *The American Journal of Comparative Law* 63

Mallat, Chibli ‘From Islamic to Middle Eastern Law: A Restatement of the Field (Part II)’ (2004) *The American Journal of Comparative Law* 209

Mallinder, Louise, *Amnesty, human rights and political transitions: bridging the peace and justice divide* (Hart Publishing 2008)

— ‘Retribution, Restitution And Reconciliation: Limited Amnesty In Bosnia-Herzegovina’ (2009) Working Paper No. 3, Beyond Legalism: Amnesties, Transition And Conflict Transformation, Institute Of Criminology And Criminal Justice, Queen’s University Belfast

Mani, Rama, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity/Blackwell 2002)

— ‘Dilemmas of expanding transitional justice, or forging the nexus between transitional justice and development’ (2008) 2(3) *IJTJ* 253

Manikkalingam, Ram ‘Promoting peace and protecting rights: how are human rights good and bad for resolving conflict?’ (2008) 5(1) *Essex Human Rights Review* 1

Marks, Susan ‘Human Rights and Root Causes’ (2011) 74 *MLR* 57

— ‘Human rights in disastrous times’, in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012)

Martin, Rex, *A System of Rights* (Clarendon Press 1997 [1993])

Masud, Muhammad Khalid, Rudolph Peters and David Stephan Powers (eds), *Dispensing Justice in Islam: Qadis And Their Judgements* (Brill 2006)

Mattei, Ugo ‘Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems’ (1997) 45 *American Journal of Comparative Law* 5

Maududi, A.A, *Human Rights in Islam* (Lahore: Islamic Publications 1977)

Mayer, Ann Elizabeth, *Islam and human rights: Tradition and politics* (Westview Press 1991)

— ‘Universal versus Islamic Human Rights: A Clash of Cultures or Clash with a Construct’ (1993) 15 *Mich J Intl L* 307

McAuliffe, Padraig, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship* (Routledge 2013)

McCarthy, Conor ‘Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory’ (2009) 3 *IJTJ* 250

McCormick, John P ‘Derrida on Law; Or, Poststructuralism Gets Serious’ (2001) 29(3) *Political Theory* 395

McCrea, Ronan ‘Religion as a Basis of Law in the Public Order of the European Union’ (2009) 16 *Colum J Eur* L 81

McEvoy, Kieran ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’ (2007) 34(4) *Journal of Law and Society* 411

— *The Trouble with Truth: Struggling with the Past in Northern Ireland* (Routledge 2011)

— ‘What Did the Lawyers Do During the ‘War’? Neutrality, Conflict and the Culture of Quietism’ (2011) 74(3) *Modern Law Review* 350

McEvoy, Kieran and Lorna McGregor (eds) Transitional justice from below: Grassroots activism and the struggle for change (Hart, 2008)

McEvoy, Kieran and Louise Mallinder, ‘Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy’ (2012) 39(3) *Journal of Law and Society* 410

McEvoy, Kieran and Harry Mika, ‘Restorative justice and the critique of informalism in Northern Ireland’ (2002) 42(3) *British Journal of Criminology* 534

McEvoy, Kieran and Tim Newburn (eds), *Criminology, Conflict Resolution and Restorative Justice* (Palgrave Macmillan 2003)

McGinnis, John O 'Lawyers as the Enemies of the Truth' (2003) 26 *Harv J L and Pub Pol* 231

McGoldrick, Dominic, *The Human Rights Committee* (Clarendon Press 1991)

McInerney-Lankford, Siobhan 'Fragmentation of International Law Redux: The Case of Strasbourg' (2012) 32(3) *OJLS* 609

Mehdi, Rubya, 'The offence of rape in the Islamic law of Pakistan' (1997) 18 *Women Living under Muslim Laws: Dossier* 98

Mendeloff, David 'Trauma and vengeance: Assessing the psychological and emotional effects of post-conflict justice' (2009) 31(1) *HRQ* 592

Mendez, Juan E 'Accountability for Past Abuses' (1997) 19 *HRQ* 255

— 'An emerging 'Right to Truth': Latin-American contributions', in Suzanne Karstedt (ed), *Legal Institutions and Collective Memories* (Hart 2009)

— 'In Defense of Transitional Justice', in James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press 1997)

Méndez, Juan E and Javier Mariezcurrena, 'Accountability for Past Human Rights Violations: Contributions of the Inter-American Organs of Protection' (1999) 26 *Social Justice* 78

Meron, Theodor, Human Rights and Humanitarian Norms as Customary Law (Third Edition, Clarendon Press 1989)

— 'Rape as a crime under international humanitarian law' (1993) *AJIL* 424

— *War Crimes Law Comes of Age: Essays* (Clarendon Press 1998)

Merrills, JG, *The Development of International Law by the European Court of Human Rights* (2nd ed, Manchester University Press 1993)

Merry, Sally Engle 'Global Human Rights and Local Social Movements in a Legally Plural World' (1997) 12 *Canadian Journal of Law and Society* 247

— 'Human Rights Law and the Demonization of Culture (And Anthropology along the Way)' (2003) 26(1) *PoLAR* 55

— 'Legal Pluralism' (1988) 22 *Law and Society Review* 869

Meshal, Reem 'Antagonistic Sharīʿas and the Construction of Orthodoxy in Sixteenth-Century Ottoman Cairo' (2010) 21(2) *Journal of Islamic Studies* 183

Messick, Brinkley 'The Mufti, the text and the world: legal interpretation in Yemen' (1986) 21(1) *Man* 102

— 'Legal Narratives from Shari'a Courts', in Baudouin Dupret, Barbara Drieskens and Annelies Moors (eds), *Narratives of Truth in Islamic Law*, (IB Tauris 2008)

Meyer, Linda 'Between Reason and Power: Experiencing Legal Truth' (1998-1999) 67 *U Cin L R* 727

Mezey, Naomi 'Law as Culture', in Austin Sarat and Jonathan Simon (eds), *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism* (Duke University Press 2003)

Michalowski, Sabine (ed), *Corporate Accountability in the Context of Transitional Justice* (Routledge 2013)

—'No Complicity Liability for Funding Gross Human Rights Violations?' (2012) 30 *Berkeley J Intl Law* 451

Michalowski, Sabine and Juan Pablo Bohoslavsky 'Ius Cogens, Transitional Justice and Other Trends of the Debate on Odious Debts: A Response to the World Bank Discussion Paper on Odious Debts' (2009-2010) 48 *Colum J Transnatl L* 59

Miller, Toby 'What It Is and What It Isn't: Cultural Studies Meets Graduate Student Labour', in Austin Sarat and Jonathan Simon (eds), *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism* (Duke University Press 2003)

Miller, Zinaida 'Effects of Invisibility: In Search of the 'Economic' in Transitional Justice' (2008) 2 *IJTJ* 266

Mills, Kurt 'Bashir is Dividing Us: Africa and the International Criminal Court' (2012) 34(2) *HRQ* 404

Minow, Martha, *Breaking the cycles of hatred: Memory, Law and Repair* (Princeton University Press 2002)

Mitchell, Michael and Jim Sidanius 'Social Hierarchy and the Death Penalty: A Social Dominance Perspective' (1995) 16(3) *Political Psychology* 591

Mobekk, Eirin 'Transitional Justice in Post-Conflict Societies–Approaches to Reconciliation' in Anja H. Ebnother and Philipp H. Fluri (ed) *After Intervention: Public Security Management in Post Conflict Societies-from Intervention to Sustainable Local Ownership* (Vienna: Bureau for Security Policy at the Austrian Ministry of Defence, 2005)

Moore, Michael S 'The Plain Truth about Legal truth' (2003) 26 *Harvard J of Law and Public Policy* 23

Moore, Sally F and Barbara G Myerhoff (eds), *Secular Ritual* (Van Gorcum, Assen 1977)

Morgenthau, Hans J 'Positivism, functionalism, and international law' (1940) 34 *AJIL* 260

Morris, Madeline H. 'The Trials of Concurrent Jurisdiction: The Case of Rwanda' (1996) 7 *Duke J Comp & Intl L* 349

Morsy, Ahmed and Nathan J Brown, 'Egypt's al-Azhar Steps Forward' (2013) Carnegie Endowment for Global Peace, available at http://carnegieendowment.org/2013/11/07/egypt-s-al-azhar- steps-forward# [accessed 8 November 2013]

Mowbray, Alastair 'The Creativity of the European Court of Human Rights' (2005) 5 *HRLR* 57

Müftüler-Bac, Mealtime 'Through the looking glass: Turkey in Europe' (2000) 1(1) *Turkish Studies* 21

Mutua, Makau W 'The Ideology of Human Rights' (1996) 36 *VaJIL* 589

Mutua, Makau, and Antony Anghie, 'What is TWAIL?' (2000) *Proceedings of the Annual Meeting of the American Society of International Law* 31

Muvingi, Ismael 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies" (2009) 3 *IJTJ* 163

N

Nader, Laura (ed) *Law in Culture and Society* (Aldine, 1969)

Nagy, Rosemary 'Transitional Justice as Global Project: Critical Reflections' (2008) 29(2) *Third World Quarterly* 282

Naqvi, Yasmin 'The right to truth in international law, fact or fiction?' (2006) 88 *IRRC* 245

Nelken, David 'Disclosing/invoking legal culture: an introduction' (1995) 4(4) *Social and Legal Studies* 435

Nelson, John O 'Against human rights' (1990) 65 *Philosophy* 341

Nesiah, Vasuki 'Discussion Lines on Gender and Transitional Justice: An Introductory Essay Reflecting on the ICTJ Bellagio Workshop on Gender and Transitional Justice' (2006) 15 *Columbia Journal of Gender and Law* 799

Neuman, Gerald L 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19(1) *EJIL* 101

Newton, Michael A 'The Iraqi High Criminal Court: controversy and contributions' (2006) 88(862) *International Review of the Red Cross* 399

Ní Aoláin, Fionnuala 'Women, security, and the patriarchy of internationalized transitional justice' (2009) 31(4) *HRQ* 1055

Ní Aoláin, Fionnuala and Eilish Rooney, 'Underenforcement and Intersectionality: Gendered Aspects of Transition for Women' (2007) 1(3) *IJTJ* 338

Ní Aoláin, Fionnuala and Catherine Turner, 'Gender, Truth and Transition' (2007) 16 *UCLA Women's LJ* 229

Niarchos, Catherine N 'Women, war, and rape: Challenges facing the international tribunal for the former Yugoslavia' (1995) 17(4) *HRQ* 649

Nino, Carlos S, *Radical Evil on Trial* (Yale University Press 1996)

Nmehielle, Vincent Obisienunwo Orlu 'Sharia law in the northern states of Nigeria: To implement or not to implement, the constitutionality is the question' (2004) 26(3) *HRQ* 730

Noonan, John T, *Persons and the Masks of the Law: Cardozo, Holmes, Jefferson and Wythe as Makers of the Masks* (University of California Press 1976)

O

O'Callaghan, Patrick 'Collective memory in law and policy: the problem of the sovereign debt crisis' (2012) 32(4) *Legal Studies* 642

Odinkalu, Chidi 'Why more Africans don't use human rights language' (1999) 2 *Human Rights Dialogue* 1

Oette, Lutz 'Law reform in times of peace processes and transitional justice: The Sudanese dimension' in Lutz Oette (ed), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Ashgate 2013)

Okello, Moses Chrispus 'Afterward: Elevating Transitional Local Justice or Crystallizing Global Governance?' in Rosalind Shaw and Lars Waldorf (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press 2010)

Olsen, Tricia D, Leigh A Payne, and Andrew G Reiter. 'The justice balance: When transitional justice improves human rights and democracy' (2010) 32(4) *HRQ* 980

Olsen, Tricia D et al 'When truth commissions improve human rights' (2010) 4(3) *IJTJ* 457

Omer, Atalia 'Can a Critic Be a Caretaker too? Religion, Conflict, and Conflict Transformation' (2011) 79(2) *Journal of the American Academy of Religion* 459

Orford, Anne 'Commissioning the Truth' (2006) 15 *Colum J Gender and L* 851

Osiel, Mark, *Mass Atrocities, Collective Memory, and the Law* (Transaction Publishers 1997)

Othman, Aida '"And Amicable Settlement is Best": Sulh and Dispute resolution in Islamic Law' (2007) 21 *Arab Law Quarterly* 64

P

Paige, Arthur 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice', (2009) 31 *HRQ* 321

Pampalk, Madalena and Nandor Knust 'Transitional Justice und Positive Komplementarität', available at http://zis-online.com/dat/artikel/2010_11_502.pdf [accessed 15 April 2014]

Panepinto, AM 'Transitional Justice: International Criminal Law and Beyond' (2014) 3 *Archivio Penale*

Pasqualucci, Jo M 'The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law' (1994/1995) 26 *University of Miami Inter-American Law Review* 297

Pena, Mariana and Gaelle Carayon, 'Is the ICC Making the Most of Victim Participation?' (2013) 7 *IJTJ* 518

Petrażycki, Leon, *Law and morality* (Transaction Publishers 2011)

Philpott, Daniel 'Religion, reconciliation, and transitional justice: The state of the field' (2007) Social Science Research Paper Working Paper (17 October 2007)

— 'What religion brings to the politics of transitional justice' (2007) 61(1) Journal of International Affairs 93

Podgorecki, Adam 'Unrecongnized Father of Sociology of Law: Leon Petrazycki - Reflections Based on Jan Gorecki's Sociology and Jurisprudence of Leon Petrazycki' (1980-1981) 15 *Law & Soc'y Rev.* 183

Pollard, Jane and Michael Samers 'Islamic banking and finance: postcolonial political economy and the decentring of economic geography' (2007) 32(3) *Transactions of the Institute of British Geographers* 313

Posner, Eric 'The case against human rights', The Guardian 4 December 2014, available at http://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights [accessed 10 January 2015]

Posner, Eric A and Adrian Vermeule, 'Transitional justice as ordinary justice' (2004) 117 *Harv L Rev* 761

— 'Demystifying Schmitt' (2011) Chicago Public Law and Legal Theory Working Paper 333

Posner, Eric A and Alan O Sykes, *Economic foundations of international law* (Harvard University Press 2013)

Pound, Roscoe, *Social Control through Law* (Transaction Publishers, 1942)

— 'The Call for a Realist Jurisprudence' (1931) 44(5) *Harvard Law Review* 697

Preuss, Ulrich K. 'Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization' (2006) 51 *NYL Sch L Rev* 467

Pryor, Judith, *Constitutions: Writing Nations, Reading Difference* (Routledge/Birkbeck Law Press 2008)

Pugh, Michael 'The political economy of peacebuilding: a critical theory perspective' (2005) 10(2) *International Journal of Peace Studies* 23

Purvis, Nigel. 'Critical legal studies in public international law' (1991) 32 *Harv Intl LJ* 81

Q

Quraishi, Asifa 'Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective' (1997) 18 *Mich. J. Int'l L.* 287

R

Rabb, Intisar A. 'Islamic Legal Maxims as Substantive Canons of Construction: Hudud – Avoidance in Cases of Doubt' (2010)17 *Arab Law Quarterly* 63

— *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (CUP 2014)

Radin, Margaret Jane 'Reconsidering the Rule of Law' (1989) 69 *Boston University Law Review* 781

Rahman, Fazur, *Islam* (2nd Revised edition edition, University of Chicago Press 1979)

— 'Islamic modernism: Its scope, method and alternatives' (1970) 1(4) *International Journal of Middle East Studies* 317

Ramji-Nogales, Jaya 'Designing Bespoke Transitional Justice: A Pluralist Process Approach' (2010) 32(1) *Michigan Journal of International Law* 1

Rappaport, Roy A, *Ritual and Religion in the Making of Humanity* (CUP 1999)

Rawls, John, *A Theory of Justice* (Harvard University Press 1971)

— 'The Idea of an Overlapping Consensus' (1987) 7(1) *Oxford Journal of Legal Studies*, 1

— 'The Idea of Public Reason Revisited' (1997) 64(3) *The University of Chicago Law Review* 765

Razack, Sherene, *Casting out: The eviction of Muslims from western law and politics* (University of Toronto Press 2008)

Rehman, Javaid 'Islamophobia after 9/11: International Terrorism, Sharia and Muslim Minorities in Europe—The Case of the United Kingdom' (2003) 3(1) *European Yearbook of Minority Issues Online* 217

— *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order* (Hart 2005)

Reisman, W Michael 'The View from the New Haven School of International Law' (1992) 86 *Am Socy Intl L Proc* 118

Renteln, Alison Dundes, *International Human Rights: Universalism versus Relativism* (Quid Pro Books 2013)

Reza, Sadiq 'Torture and Islamic Law' (2007-8) 8 *Chicago Journal of International Law* 21

Riles, Annelise (ed) *Rethinking the Masters of Comparative Law* (Hart Publishing 2001)

Roberts, Anthea 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *AJIL* 757

Rohe, Mathias, *Islamic Law in Past and Present* (Brill 2015)

Roht-Arriaza, Naomi 'Editorial Note' (2013) 7 *IJTJ* (2013) 383

— 'State responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law', (1990) 78 *California Law Review* 449

— 'The New Landscape of Transitional Justice' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (CUP 2006)

Roht-Arriaza, Naomi and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (CUP 2006)

Rosen, Lawrence 'Islamic 'case law' and the logic of consequence' in June Starr, Jane Fishburne Collier (eds), *History and power in the study of law: new directions in legal anthropology* (Cornell University Press 1989)

Rosenn, Keith S. 'Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society' (1990) *The American Journal of Comparative Law* 773

S

Sacco, Rodolfo 'Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)' (1991) *American Journal of Comparative Law* 1

— 'Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)' (1991) 39(2) *American Journal of Comparative Law* 343

— 'Mute Law' (1995) 43(3) *American Journal of Comparative Law* 455

— 'One Hundred Years of Comparative Law' (2001) 75 *Tulane Law Review* 1159

— *Tesi di Trento* (Trento, 3 June 1987), original version at http://www.jus.unitn.it/cardozo/Review/2008/Trento2.pdf [accessed 15th September 2013]

Said, Edward, *Orientalism* (Vintage Books 1978)

— 'Orientalism Reconsidered' (1985) 1 *Cultural Critique* 89

Salmón, Elizabeth 'Reflections on international humanitarian law and transitional justice: lessons to be learnt from the Latin American experience' (2006) 88(862) *International Review of the Red Cross* 327

Sankey, Diana 'Towards Recognition of Subsistence Harms: Reassessing Approaches to Socioeconomic Forms of Violence in Transitional Justice' (2014) 8 *IJTJ* 121

Sarat, Austin and Jonathan Simon, 'Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship', in Austin Sarat and Jonathan Simon (eds), *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism* (Duke University Press 2003)

Savelsberg, Joachim J and Ryan D King 'Law and collective memory' (2007) 3 *Annu Rev Law Soc Sci* 189

Schabas, William A 'Islam and the death penalty' (2000) 9 *Wm and Mary Bill Rts* J 223

— 'Genocide trials and Gacaca courts' (2005) 3(4) *Journal of International Criminal Justice* 879

— 'Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights' (2011) 9 *J Intl Crim Justice* 609

— *The UN international criminal tribunals: the former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006)

Schacht, Joseph, *Introduction to Islamic Law* (Clarendon Press 1966)

— *The Origins of Muhammadan Jurisprudence* (Clarendon Press 1967)

Schiff Berman, Paul 'Global Legal Pluralism' (2006–2007) *Southern California Law Review* 1155

— 'Telling a Less Suspicious Story' in Austin Sarat and Jonathan Simon (eds) *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism*, (Duke University Press 2003)

Schlesinger, Rudolf B 'Research on the General Principles of Law Recognized by Civilized Nations' (1957) 51 *AJIL* 734

Schmid, Evelyne and Aoife Nolan, ''Do No Harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice' (2014) 8 *IJTJ* 362

Schmitt, Frederick F, *Theories of Truth* (Blackwell 2004)

Seda-Poulin, Maria Luisa, 'Islamization and Legal Reform in Malaysia: The Hudud Controversy of 1992' (1993) *Southeast Asian Affairs* 224

Shahar, Ido 'Legal Pluralism and the Study of Shari'a Courts' (2008) 15 *Islamic Law and Society* 112

Shaw, Rosalind and Lars Waldorf (eds), *Localising Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press 2010)

Shemesh, Aharon, *Halakhah in the Making* (University of California Press 2009)

Shklar, Judith N, *Legalism: Law, Morals, and Political Trials* (Harvard University Press 1964)

Siems, Mathias, *Comparative Law* (CUP 2014)

Sikkink, Kathryn 'From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights' (2008) 50(1) *Latin American Politics and Society* 1

Sikkink, Kathryn and Carrie Booth Walling, 'Argentina's Contribution to Global Trends in Transitional Justice' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (CUP 2006)

Silby, Susan 'Making a Place for a Cultural Analysis of Law' (1992) 17 *Law and Soc Inquiry* 39

Simhony, Avital 'T. H. Green's Community of Rights: An Essay on the Complexity of Liberalism' (2003) 8(3) *Journal of Political Ideologies* 269

Simma, Bruno and Philip Alston, 'The Sources of Human Rights: Custom, jus cogens and general principles' 12 *AusYBIL* 82

Skovgaard-Petersen, Jakob 'A Typology of State Muftis' in Yvonne Yazbeck Haddad and Barbara Freyer Stowasser (eds), *Islamic Law and the Challenges of Modernity* (Altamira Press 2004)

Solis, Gary D, *The Law of Armed Conflict: International Humanitarian Law in War* (CUP 2010)

Sriram, Chandra Lekha 'Justice as peace? Liberal peacebuilding and strategies of transitional justice' (2007) 21(4) *Global society*, 579

— *Confronting past human rights violations* (Routledge 2004)

Stahn, Carsten 'Libya, the International Criminal Court and Complementarity A Test for 'Shared Responsibility'' (2012) 10(2) *Journal of International Criminal Justice* 325

Stein, Eric 'Uses, Misuses – and Nonuses of Comparative Law' (1977) 72 *Nw UL Rev* 198

Stephens, Dale, 'Human Rights and Armed Conflict-The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case' (2001) 4 *Yale Hum Rts & Dev LJ* 1

Stevens, Joanna, *Traditional and Informal Justice Systems in Africa, South Asia and the Caribbean* (Penal Reform International 1999)

Struckman, Luke and Tristan Sturm, 'Introduction: Interrogating Conventional Geopolitics of the Middle East' (2012) 16(1) *The Arab World Geographer* 3

Summers, Robert S. 'Formal legal truth and substantive truth in judicial fact-finding – their justified divergence in some particular cases' (1999) 18 *Law and Philosophy* 497

Sumner, LW, *The Moral Foundation of Rights* (Clarendon Press 1989)

Sweeney, James A, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (Routledge 2013)

— 'Restorative Justice and Transitional Justice at the ECHR' (2012) 12 *ICLR* 313

T

Tabandeh, Sultanhussein, *A Muslim Commentary on the Universal Declaration of Human Rights* (1970)

Taha, Mahmoud Mohamed, *The Second Message of Islam* (An-Naim tr, Syracuse University Press 1987)

Taji-Farouki, Suha (ed) *Modern Muslim intellectuals and the Qur'an* (OUP 2004)

Tamanaha, Brian Z. 'Understanding legal pluralism: past to present, local to global' (2008) 30 *Sydney L Rev* 375

Taylor, Richard 'Complicity, legal scholarship and the law of unintended consequences' (2009) 29(1) *Legal Studies* 1

Teitel, Ruti G. 'Editorial Note: Transitional Justice Globalized', (2008) 2 *IJTJ* 1

— 'How are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses?', in Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington: United States Institute of Peace 1997)

—'Post-Communist Constitutionalism: A Transitional Perspective' (1994) 26 *Colum Hum Rts L Rev* 167

— 'The law and politics of contemporary transitional justice' (2005) in 38 *Cornell Intl LJ* 837

— ‘Transitional Justice: post war legacies’ (2005-2006) 27 *Cardozo Law Review* 1615

— ‘Transitional justice genealogy’ (2003) 16 *Harvard Human Rights Journal* 69

Tellenbach, Silvia ‘Islamic Criminal Law’ in Markus D Dubber and Tatjana Hörnle (eds), T*he Oxford Handbook of Criminal Law* (OUP 2014)

Teubner, Gunther ‘The Two Faces of Janus: Rethinking Legal Pluralism’ (1991) 13 *Cardozo L Rev* 1443

Theidon, Kimberly ‘Justice in Transition: The Micropolitics of Reconciliation in Postwar Peru’ (2006) 50 *Journal of Conflict Resolution* 433

Thoms, Oskar NT, James Ron, and Roland Paris, ‘State-level effects of transitional justice: What do we know?’ (2010) 4(3) *IJTJ* 329

Tibi, Bassam ‘Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations’ (1994) 16 *HRQ* 277

Tompkins, Tamara L ‘Prosecuting rape as a war crime: Speaking the unspeakable’ (1994) 70 *Notre Dame L Rev* 845

Tomuschat, Christian ‘International criminal prosecution: The precedent of Nuremberg confirmed’ (1994) 5(2-3) *Criminal Law Forum* 237

— ‘Darfur—Compensation for the Victims’ (2005) 3 *Journal of International Criminal Justice* 579

Tulkens, Francoise ‘The Paradoxical Relationship between Criminal Law and Human Rights’ (2011) 9 *J Intl Crim Justice* 577

Turner, Catherine ‘Delivering lasting peace, democracy and human rights in times of transition: The role of international law’ (2008) 2 *IJTJ* 126

Twining, William ‘Have concepts, will travel: analytical jurisprudence in a global context’ (2005) 1(1) *International Journal of Law in Context* 5

— *Rethinking Evidence, Exploratory Essays* (2nd edn, CUP 2006)

V

Van den Wyngaert, Christine ‘Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge’ (2012) 44 *Case Western Reserve Journal of International Law* 475

van Zyl, Paul ‘Promoting transitional justice in post-conflict societies’ in Alan Bryden and Heiner Hänggi (eds) *Security and Governance in Post-Conflict Peacebuilding* (Geneva Centre for the Democratic Control of Armed Forces 2005)

Viaene, Lieselotte and Eva Brems, ‘Transitional justice and cultural contexts: learning from the Universality debate’ (2010) 28(2) *Netherlands Quarterly of Human Rights* 199

Vikør, Knut S, *Between God and the Sultan: a history of Islamic law* (OUP 2005)

Villa-Vicencio, Charles ‘Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions’ (2000) 49 *Emory L J* 205

Vinjamuri, Leslie and Aaron P. Boesenecker, ‘Religious Actors and Transitional Justice’ in Thomas Banchoff (ed), *Religious Pluralism, Globalisation and World Politics* (CUP 2008)

Voeten, Erik ‘Borrowing and non-Borrowing among International Courts’ (2010) 39 *Journal of Legal Studies* 547

W

Waldorf, Lars ‘Anticipating the Past: Transitional Justice and Socio-Economic Wrongs’ (2012) 21(2) *Social and Legal Studies* 171

— ‘Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice’ (2006) 79 *Temple Law Review* 1

Waldron, Jeremy ‘Foreign Law and the Modern Jus Gentium’ (2005) 119(1) *Harvard Law Review* 129

Watson, Alan ‘Aspects of reception of law’ (1996) *American Journal of Comparative Law* 335

— *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1974)

Weber, Max, *On Law in Economy and Society* (Harvard University Press 1954)

Weyrauch, Walter Otto 'Law as Mask-Legal Ritual and Relevance' (1978) 66(4) *California Law Review* 699

Weil, Prosper 'Towards relative normativity in international law' (1983) 77 *AJIL* 413

Weiler, Joseph HH et al, *Un'Europa cristiana: un saggio esplorativo* (BUR Milano 2003)

Weisbrod, Carol, *Emblems of Pluralism: Cultural Differences and the State* (Princeton University Press 2002)

Weiss, Bernard, *The Spirit of Islamic Law* (University of Georgia Press 1998)

— 'The Madhhab in Islamic Legal Theory' in PJ Bearman, Rudolph Peters and Frank E Vogel (eds), *The Islamic school of law: evolution, devolution, and progress* (Islamic Legal Studies Program, Harvard Law School Harvard University Press 2005)

Westbrook, D 'Islamic International Law and Public International Law: Separate Expressions of World Order' (1992-93) 33 *Virginia Journal of International Law* 819

White, Robin and Iris Boussiakou 'Separate Opinions in the European Court of Human Rights' (2009) 9 *HRLR* 37

Whiting, Alex 'In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered' (2009) 50(2) *Harvard International Law Journal* 323

Whitman, James 'The neo-romantic turn' in Pierre Legrand and Roderick Munday (eds) *Comparative Legal Studies* (CUP 2011)

Wilcox, Luke 'Reshaping Civil Society through a Truth Commission: Human Rights in Morocco's Process of Political Reform' (2009) 3(1) *IJTJ* 49

Wildhaber, Luzius 'The European Convention on Human Rights and International Law' (2007) 56 *ICLQ* 217

Wilkitzki, Peter 'German Government Not Obliged to Seek Extradition of CIA Agents for 'Extraordinary Rendition': Comments on the El-Masri Judgment of the Cologne Administrative Court' (2011) 9 *JICJ* 1117

Williams, Michael, *Problems of Knowledge: a critical introduction to epistemology* (OUP 2001)

Wittgenstein, Ludwig, *Philosophical Investigations* (3rd edition, Blackwell 1968)

Wright, Quincy 'The Law of the Nuremberg Trial' (1947) 41(1) *AJIL* 38

Wulf, Herbert 'Security sector reform in developing and transitional countries' in Clem McCartney, Martina Fischer and Oliver Wils (eds), *Security Sector Reform: Potential and Challenges for Conflict Transformation* (Berlin: The Berghof Handbook Dialogue Series No. 2, 2004)

Y

Young, Laura A and Rosalyn Park, 'Engaging Diasporas in Truth Commissions: Lessons from the Liberia Truth and Reconciliation Commission Diaspora Project' (2009) 3 *IJTJ* 341

Yusuf, Hakeem O, 'The Judiciary and Constitutionalism in Transitions: A Critique' (2007) 7(3) *Global Jurist* 1

Z

Zalaquett, Jose, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' (1992) 43 *Hastings Law Journal* 1425

Zaring, David 'The Use of Foreign Decisions by Federal Courts: An Empirical Analysis' (2006) 3 *Journal of Empirical Legal Studies* 297

Zeghal, Malika 'Religion and politics in Egypt: The ulema of al-Azhar, radical Islam, and the state (1952–94)' (1999) 31(3) *International Journal of Middle East Studies* 371

— 'The "Recentering" of Religious Knowledge and Discourse: The Case of al-Azhar in Twentieth Century Egypt', in Robert Heffner and Muhammad Qasim Zaman (eds) *Schooling Islam: The culture and politics of modern Muslim education* (Princeton University Press 2007)

Zegveld, Liesbeth ‘Remedies for victims of violations of international humanitarian law’ (2003) 85(851) *IRRC* 497

Žižek, Slavoj ‘Against human rights’ (2005) 34 *New Left Review* 115

Zomeño, Amalia ‘The Stories in the Fatwas and the Fatwas in History’, in Baudouin Dupret, Barbara Drieskens and Annelies Moors (eds), *Narratives of Truth in Islamic Law* (IB Tauris 2008)

Zweigert and Kötz, *An Introduction to Comparative Law* (3rd ed, OUP 1998)

Table of Cases

— ECHR
Airey v Ireland, App no 6289/73 (ECHR 9 Oct 1979)
Al-Adsani v UK, App no 35763/97 (ECHR 21 Nov 2001)
Al-Skeini v UK, App no 55721/07 (ECHR 7 Jul 2011)
Association 21 December 1989 v Romania, App no 33810/07 and 18817/08 (ECHR 24 May 2011)
Banković and others v Belgium, App no 52207/99 (ECHR 12 Dec 2001)
Belilos v Switzerland, App no 10328/83 (ECHR 29 Apr 1988)
Blecić v Croatia, App no 59532/00 (ECHR 8 Mar 2006)
Catan and Others v Moldova and Russia, App nos 43370/04, 8252/05 and 18454/06 (ECHR 19 Oct 2012)
Chalal v UK, App no 22414/93 (ECHR 15 Nov 1996)
Cruz Varas and others v Sweden, App no 15576/89 (ECHR 20 Mar 1991)
Cudak v Lithuania, App no 15869/02 (ECHR 23 Mar 2010)
E and others v UK, App no 33218/96 (ECHR 26 Nov 2002)
El-Masri v FYRM, App No 39630/09 (ECHR 13 December 2012)
Fogarty v UK, App no 37112/97 (ECHR 21 Nov 2001)
Golder v the United Kingdom, App no 4451/70 (ECHR 21 February 1975)
Goodwin v UK, App no 28957/95 (ECHR 11 Jul 2002)
Husayn (Abu Zubaydah) v Poland, App no 7511/13 (ECHR 24 July 2014)
Ireland v UK, App no 5310/71 (ECHR 18 Jan 1978)
Janowiec and others v Russia, App nos 55508/07 and 29520/09 (ECHR 21 Oct 2013)
Kosiek v Germany, Application no 9704/82 (ECHR 28 Aug 1986)
Loizidou v Turkey, App no 15318/89 (ECHR 18 Dec 1996)
M and Others v Italy and Bulgaria, App no 40020/03 (ECHR 31 July 2012)
Mamatkulov and Askarov v Turkey, App nos 46827/99 and 46951/99 (ECHR 4 Feb 2005)
McElhinney v Ireland, App no 31253/96 (ECHR 21 Nov 2001)
National Union of Belgian Police v Belgium, App no 4464/70 (ECHR 27 Oct 1975)
Osman v UK, App no 23452/94 (ECHR 28 Oct 1998)
Othman (Abu Qatada) v UK, App no 8139/09 (ECHR, 17 January 2012)
Rantsev v Cyprus and Russia, App no 25965/04 (ECHR 7 Jan 2010)
Refah Partisi and others v Turkey Apps nos 41340/98, 41342/98, 41343/98 and 41344/98 (ECHR 13 Feb 2003)
Sabeh El Leyl v France, App no 34869/05 (ECHR 29 Jun 2011)
Sørensen and Rasmussen v Denmark, App nos 52562/99 and 52620/99, (ECHR 11 Jan 2006)
Swedish Engine Drivers Union v Sweden, App no 5614/72 (ECHR 6 Feb 1976)
Tyrer v UK, App no 5856/72 (ECHR 25 Apr 1978)
Van der Mussele v Belgium, App no 8919/80 (ECHR, 23 Nov 1983)
X and Y v The Netherlands App no 8978/80 (ECHR 26 March 1985)
Yasa v. Turkey App No 63/1997/847/1054 (ECHR 2 Sept 1998)

— IACHR
Alfonso René Chanfreau Orayce v Chile, Inter-Am CHR Cases 11.505 et al, Report No 25/98 (7 April 1998)
Bolaños v Ecuador, Inter-Am CHR Case 10.580, Report No 10/95 (12 September 1995)
Contreras et al v El Salvador, Inter-Am CHR Series C No 232 (31 August 2011)
Ignacio Ellacuría v El Salvador, Inter-Am CHR Case 10.488, Report No 136/99 (22 December 1999)
Lucio Parada Cea, Héctor Joaquín Miranda Marroquín, et al v El Salvador, Inter-Am CHR Case 10.480, Report No 1/99 (27 January 1999)
Monsignor Oscar Arnulfo Romero y Galdámez v El Salvador, Inter-Am CHR Case 11.481, Report No 37/00 (13 Apr 2000)
Velásquez Rodríguez v Honduras, Inter-Am CHR Series C No 4 (29 Jul 1988)

— ICJ
Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion [8 July 1996] ICJ Rep 226
Legal Consequences of the Construction of a Wall, Advisory Opinion [9 July 2004] ICJ Rep 136

— ICTY
Aleksovski ICTY A Ch. (24th March.3. 2000)
Karadzic Case (Decision on the accused's motion for access to ex parte filings in the Slobodan Milošević case (Srebrenica intercepts)) ICTY -95-5/18-T, ICTY-02-54-T (28 Feb 2011)
Kupreskic, Case No. IT-95-16-T, Trial Judgment, (14 Jan 2000)
Kunarac, Kovac and Vukovic, Case no IT-96-23T, Judgment 22 Feb 2001 Hadzic Case (Decision on motion on behalf of Goran Hadzic seeking access to confidential material in prosecutor v. Slobodan Milošević related to Croatia) ICTY-04-7S-PT, ICTY-02-S4-T (22 Mar 2012)
Milošević Case (Order Terminating the Proceedings) ICTY-02-54-T (14 March 2006)
Milošević Case (Order Lifting Confidentiality of Relevant Materials for Investigation Purposes) ICTY-02-54-T (16 Mar 2006)
Momir Nikolić ICTY T. Ch. I (2nd December 2003)

Treaties, Declarations and International Documents

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58

Bahrain Independent Commission of Inquiry (BICI), Report (10 Dec 2011) available at http://www.bici.org.bh/BICIreportEN.pdf [accessed 18 April 2012]

Charter of the United Nations (24 October 1945) 1 UNTS XVI

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85

Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979) 1249 UNTS 13

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) ETS 5

— Parliamentary Assembly of the Council of Europe (PACE), Resolution 1463 on Enforced Disappearances (3 Oct 2005)

— Guidelines: Eradicating impunity for serious human rights violations (adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies)

EU, 'Council Framework Decision on the standing of victims in criminal proceedings' (15 March 2001) 2001/220/JHA

ICTY Prosecutor, Ms. Carla Del Ponte, Press conference at the ICTY in The Hague on 12 March, at 12.00. Press release FH/OTP/1051e available at http://www.icty.org/sid/8793 [accessed 12 August 2013]

International Committee of the Red Cross (ICRC), Customary IHL Database, available at https://www.icrc.org/customary-ihl/eng/docs/home [accessed 7 January 2013]

— Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287

— Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977) 1125 UNTS 3

— Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977) 1125 UNTS 609

— Report: Strengthening legal protection for victims of armed conflicts (October 2011) 31IC/11/5.1.1

International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (CED)

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

International Criminal Court (ICC), Booklet: Victims before the International Criminal Court, A Guide for the Participation of Victims in the Proceedings of the Court, available at http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf [accessed 12 January 2015]

International Law Commission (ILC), Second report on identification of customary international law' (66th session, 5th May - 6th June 2014) UN Doc A/CN.4/672

Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal (1950) Yearbook of the International Law Commission, Vol. II, 374

Rome Statute of the International Criminal Court (1998) A/CONF.183/9

Statute of the International Court of Justice (24 October 1945) 1 UNTS XVI

UN Commission on Human Rights, Human Rights Resolution 2005/66: Right to the Truth (20 April 2005) E/CN.4/RES/2005/66

— Promotion and Protection of Human Rights, 'Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher' (8 Feb 2005) UN Doc E/CN.4/2005/102/Add.1

— Promotion and Protection of Human Rights, 'Study by the Office of the UN High Commissioner for Human Rights on the right to truth' (8 Feb 2006) UN Doc E/CN.4/2006/91

UN Committee against Torture, Consideration of reports submitted by States parties under article 19 of the Convention, Concluding observations: Colombia (4 May 2010) UN Doc CAT/C/COL/CO/4

UN Committee on Economic, Social and Cultural Rights (CESCR), Concluding Observations on Israel (31 August 2001) UN Doc E/C.12/1/Add. 69

UN Development Group, Results-based Management handbook (October 2011), available at http://www.undg.org/docs/12316/UNDG-RBM%20Handbook-2012.pdf [accessed 30 Jan 2014]

UN General Assembly, Report of the Human Rights Committee, 34th session (1979) Doc A/33/40

— Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (16 December 2005) UN Doc A/RES/60/147

— Resolution 65/196, Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims (21 December 2010) UN Doc A/RES/65/196

UN High Commissioner for Human Rights, Navanethem Pillay, Dialogue with Member States on rule of law at the international level organized by the Rule of Law Unit: 'UN Approach to Transitional Justice' (2 Dec 2009) available at http://www.unrol.org/doc.aspx?d=2916 [accessed 10th January 2011]

UN Human Rights Council, Annual Report of the UN High Commissioner for Human Rights and Reports of the Office of the High Commissioner and Secretary-General, Analytical study on human rights and transitional justice (6 August 2009) UN Doc A/HRC/12/18

— Decision 2/105, Right to the truth (9 Jan 2007) UN Doc A/HRC/DEC/2/105

— 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Paraguay' (1 Oct 2007) UN Doc A/HRC/7/3/Add.3

— 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue' (20 Apr 2010) UN Doc A/HRC/14/23

— 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (1 Mar 2013) UN Doc A/HRC/22/52

— 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff' (28 August 2013) UN Doc A/HRC/24/42

— 'Report of the Working Group on Enforced or Involuntary Disappearances' (26 Jan 2011) UN Doc A/HRC/16/48

— Resolution, Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence (26 September 2011) A/HRC/RES/18/7

— Resolution 9/10, Human rights and transitional justice (18 September 2008) UN Doc A/HRC/RES/9/10

— Resolution 9/11, Right to the truth (18 September 2008) UN Doc A/HRC/RES/9/11

— Resolution 12/12, Right to the truth (12 October 2009) UN Doc A/HRC/RES/12/12

— Resolution 27/3, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (25 September 2014) UN Doc A/HRC/RES/27/3

UN Secretary General, Report, The rule of law and transitional justice in conflict and post-conflict situations (23 August 2004) S/2004/616

— Guidance Note, UN Approach to Transitional Justice (March 2010)

— Remarks at Security Council open debate on Women, Rule of Law and Transitional Justice in Conflict-Affected Situations (18 October 2013) available at: https://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=2031#.UxuDh3m73FI [accessed 5th February 2014]

— Report, Uniting our strengths: Enhancing United Nations support for the rule of law (14 December 2006) A/61/636-S/2006/980

UN Security Council, Resolution 1593 (31 March 2005) UN Doc S/RES/1593 (Darfur)

— Resolution 1970 (26 February 2011) UN Doc S/RES/1970 (Libya)

— Resolution 955 (8 November 1994) S/RES/955 (Rwanda)

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331